Supreme Court, U.S.
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Case No. 92-373

In The
Supreme Court of the United States
October Term, 1992

TIM ROCHE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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10 2 PM

QUESTION PRESENTED

(Restated)

Whether The First And Fourteenth Amendments To The United States Constitution Prohibit The State Of Florida From Compelling A Journalist To Reveal The Identity Of A Source Who Disclosed A Confidential Court Order.

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Respondent, the State of Florida, respectfully prays that this Court decline to issue a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Fourth District, in the case captioned *In re Investigation: Florida Statute 27.04, Subpoena of Roche,* 589 So.2d 978 (Fla. 4th DCA 1991), *review denied,* 599 So.2d 1279 (Fla. 1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioner, the following Florida Statutes are involved: Florida Statute § 39.467 (1990):

* * *

> (6) All hearings involving termination of parental rights shall remain confidential and closed to the public. Hearings involving more than one child may be held simultaneously when the children involved are related to each other or were involved in the same case. The child and the parents or legal custodians may be examined separately and apart from each other.

Florida Statute § 39.471 (1990):

> (3) The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the court may deem proper, and may punish by contempt proceedings any violation of those conditions.

STATEMENT OF THE CASE

A. Statement of Facts and Procedural History

Respondent can not accept Petitioner's statement of the case and procedural history as they are argumentative, include facts not included in the opinion below, and matters not relevant to the threshold jurisdictional question. The facts, as found by the Fourth District in *In re Investigation: Florida Statute 27.04, Subpoena of Tim Roche,* 589 So.2d 978 (Fla. 4th DCA 1991), *review denied,* 599 So.2d 1279 (Fla. 1992), and as supported by the trial court record (PA 3-9),[1] are that the trial court entered an order terminating a mother's parental rights. Pursuant to F.S. § 39.411 and F.S. § 39.467, said order was not open for public inspection; however, on the day after the order was issued, a story appeared in The Stuart News, written by Petitioner, which disclosed the contents of the termination order. In the course of Respondent's investigation of the violation of the statutory proscription against disclosure of such confidential juvenile orders, a subpoena was issued to Petitioner in an effort to determine who provided Petitioner with a copy of the confidential order. Petitioner moved to quash the subpoena and for a protective order, asserting that he was privileged not to disclose his source. (A 1-3). The trial court conducted a hearing, at which Petitioner stipulated that the information sought was relevant to the issues in the case, and that no alternative source existed for the information (A 9-10, 19). He asserted, however, that there was no compelling interest in requiring him to disclose his source because the privacy interests of the child no longer existed due to the massive publicity already surrounding the case

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1 References to Respondent's Appendix are designated to "(A)"; references to Petitioner's Appendix are designated "(PA)". References to the record are designated as "(R)".

The trial court disagreed and required Petitioner to disclose the identity of the person who had provided him with a copy of the confidential order within 10 days. The order further provided that if Petitioner failed to comply with the order, he would be adjudicated guilty of indirect criminal contempt and sentenced to 30 days in Martin County Jail. Petitioner could purge the contempt at any time by complying with the trial court's order (PA 10-15). When Petitioner did not comply within 10 days, Respondent filed its affidavit of noncompliance. Petitioner was adjudicated guilty of indirect criminal contempt and appealed said ruling to the appellate court.

In the Fourth District Court of Appeal, the issued raised by Petitioner was whether the State had demonstrated a compelling interest sufficient to outweigh his qualified privilege not to disclose a confidential source afforded a newspaper reporter under the First Amendment and the Florida Constitution (A 29-42). Specifically, the issue addressed by the appellate court was:

> This case involves a consideration of the tension between the constitutional right of the public to unencumbered access to information from anonymous sources and the generalized governmental interests in protecting the secrecy of juvenile proceedings from public scrutiny. More particularly, the case focuses upon a determination of the priority of societal interests in requiring certain proceedings to remain confidential as opposed to a reporter's privilege against coerced disclosure of confidential sources.

(PA 3).

In its Answer Brief, Respondent argued that it had demonstrated such a compelling interest (A 43-56), and in his reply brief, Petitioner argued that Respondent had not done so (A 57-65). The Fourth District Court of Appeal held that

the State's interest in protecting and preserving the privacy rights of parties to, and particularly of children involved in, a termination of parental rights proceeding outweighed Petitioner's qualified privilege not to disclose his source (PA 3-9).

This result occurred after the District Court observed that "the parties agree that sections 39.411 and 39.467, Florida Statutes (1989), require that proceedings terminating parental rights are protected and not subject to public scrutiny. Furthermore, they acknowledge that under the auspices of the first amendment to both federal and state constitutions a reporter has a qualified privilege not to disclose his sources of information." (PA 5). The court further opined that in reviewing the standard set forth in *Branzburg v. Hayes,* 408 U.S. 665 (1972), and acknowledged in *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577 (Fla. 1990), "the parties agree further that requirements one and two of the balancing test were met in the trial court presentation; issue was joined there and here in regard to requirement three. Roche contends that, under the facts of this case, there is no compelling interest in requiring him to divulge his sources because the privacy interests of this child have long since been blown, so to speak, by the earlier persuasive publicity surrounding the case and its background." (PA 8).

Petitioner requested the appellate court to certify to the Florida Supreme Court, as a question of great public importance, whether the State's interest in maintaining the confidentiality of juvenile proceedings was sufficiently compelling to outweigh his qualified privilege to refuse to disclose his confidential sources. (A 66-70). Respondent opposed, and the Fourth District Court of Appeal denied the motion and issued its mandate on January 14, 1992. (A 71).

On January 27, 1992, Petitioner filed notice that he intended to invoke the discretionary jurisdiction of the Florida

Supreme Court. In his brief on jurisdiction, Petitioner argued that the decision of the appellate court conflicted with settled law of the State of Florida, that the decision expressly and incorrectly construed provisions of the Federal and Florida Constitutions, and that there was no reason in this case for departing from settled law regarding journalists' qualified privilege (A 72-80). The State filed its brief disagreeing with Petitioner's arguments, and on June 2, 1992, the Florida Supreme Court declined to accept conflict jurisdiction of this case (PA 1).

B. How the Federal Question was Presented

The issue which was squarely presented, litigated and decided, was whether the State's interest in maintaining the confidentiality of termination of parental rights proceedings is sufficiently compelling to outweigh a reporter's qualified privilege to refuse to disclose his confidential source (A 1-5, 9-10, 19, 29-42, 43, 56, 57-65, PA 3-9, 10-14). Petitioner has never prior to seeking this Court's certiorari review of the state court's decision, asserted that he is being punished for publication of the confidential court order. While it is true that a *portion* of Respondent's argument in the trial court was that the publication of a confidential court order was improper, the trial court's order was not based on this argument, rather that order addressed the issue of whether Petitioner enjoyed a qualified privilege not to disclose his source (PA 10-14). Further, Respondent did not reassert such an argument in the Fourth District (A 43-56), and therefore the decision of the Fourth District does not address this issue (PA 3-9). Finally, even in seeking review in the Florida Supreme Court, Petitioner did not assert or argue that he was in effect being punished for publication; rather he requested the Court determine whether Respondent's interest in maintaining the confidentiality of termination of

parental rights proceedings outweighed his privilege of non-disclosure (A 72-80). Petitioner has failed to meet the minimum requirements mandated under *Cardinale v. Louisiana,* 394 U.S. 437 (1969), that unless it appears on the record that a federal question was both raised and decided in the state courts below, appellate jurisdiction in the United States Supreme Court fails.

REASON FOR DENYING THE WRIT

The First and Fourteenth Amendments to the United States Constitution Do Not Prohibit the State of Florida from Compelling A Journalist to Reveal the Identity of A Source Who Disclosed A Confidential Court Order.

The question answered by Florida's Fourth District Court of Appeal was whether the government in its efforts to police its employees and court officers for derelictions of their duties, may require a news reporter to reveal the source of a confidential court order.

Indeed the answer to the question does not "require fresh furrows in the First Amendment landscape." (See Petitioner's Petition for Writ of Certiorari at page 20). The question was correctly answered below based on the principles enunciated by this Court's decision in *Branzburg v. Hayes,* 408 U.S. 665 (1972), and decisions of the state courts' addressing the issue, *CBS, Inc. v. Cobb,* 536 So.2d 1067 (Fla. 2nd DCA 1988), and *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577 (Fla. 1990). As such all requested relief should be denied.

A. Petitioner's Assertion That He Is Being Punished For Publication Of Information Obtained Was Neither Raised Nor Decided Below

Respondent submits that as the record and decisions below clearly reveal that the issue suggested by Petitioner, i.e., that he is being punished for publication, was neither raised, nor decided below, therefore that issue may not be raised or decided by this Court. *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988); *Board of Directors of Rotary International v. Rotary Club,* 481 U.S. 537 (1987); *Webb v. Webb,* 451 U.S. 492 (1981); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

In a nonpersuasive attempt to overcome his jurisdictional difficulties, Petitioner asserts in his statement of how the federal question was presented that: "Though seemingly litigated as a question of a news reporter's qualified privilege not to reveal the identity of a confidential source, this case was in fact adjudicated as a question of a reporter's right to publish lawfully obtained official information about a matter of widespread community concern." (See Petitioner's Petition at 15). Nothing decided below supports Petitioner's assertion.

Petitioner further attempts to modify the factual record below by acknowledging that he "did not challenge the State's representations", (1) that there was no dispute that Petitioner possessed relevant information, or (2) that the State maintained that it had exhausted all alternative ways of determining who had leaked the Termination Order to him. (See Petitioner's Petition at 16-17). In fact, Petitioner specifically states, "both Petitioner and the State focused their arguments at the trial and appellate levels on the third prong of Florida's qualified privilege law. See R 80-85, 104." (Petitioner's Petition at 16-17).

Petitioner does not challenge whether he had in his possession relevant information. Rather, he now attempts to excuse his stipulation below, that the State "exhausted all alternative ways of determining" the leak by asserting that he relied upon Respondent's investigator's affidavit and testimony, which Petitioner asserts are inaccurate. Petitioner implies that he could not have discovered that the investigation had been incomplete until 1992, when Respondent's investigation was allegedly no longer "active" because, pursuant to F.S. § 119.07 (1991), Respondent's investigation records were exempt from disclosure. However, Petitioner offers no explanation as to why he never attempted to depose the investigator or obtain these records. Petitioner's contentions are particularly specious in light of F.S. § 119.07(8) (1991), which expressly provides that:

> (8) The provisions of this section are not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution.

Moreover, raising a "factual" change at this point comes too late. (See Petitioner's Petition at 16, footnote 11). Contrary to the representations, Petitioner could have challenged the thoroughness of Respondent's investigation but elected *not* to do so. Petitioner cannot now argue that the decision below was incorrect based upon his own stipulations as to the facts and issues that were to be resolved below. As noted in *Cardinale,* 394 U.S. at 439, "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider applicability of state statutes in light of constitutional challenge, since the statute may be construed in a way which saves their constitutionality...." In *Cardinale,* the court dismissed for

want of jurisdiction where the defendant's confession was introduced in its entirety in a subsequent trial pursuant to a Louisiana statute. Cardinale objected solely to the admission of those parts of his confession which he argued were both irrelevant and prejudicial in his trial. The court observed, "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below." *Cardinale,* 394 U.S. at 438.

The lower courts were *not* confused by Respondent's representations below, rather the courts addressed the issues *as framed and presented by Petitioner.* Nowhere in the decision of the Fourth District Court of Appeal is there any language which can be interpreted as holding that Petitioner is being punished for publication of the confidential order.

B. This Court's Recent Decision In *Florida Star* Is Distinguishable From The Circumstances Of This Case

In *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989), this Court stated:

> We do not hold that truthful publication is automatically constitutionally protected, or that, there is no zone of personal privacy within which the state may protect the individual from intrusion by the press....We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order...

Id. at 541.

Contrary to Petitioner's contentions, *no* liability (neither damages or punishment) is being placed on him for his truthful publication no matter *how* he obtained the "leaked order". Rather, in conformance with this Court's decision in *Branzburg, supra,* recognized in *Miami Herald Publishing Co. v. Morejon, supra,* and *CBS, Inc. v. Cobb, supra,* the state courts balanced Petitioner's First Amendment rights against his obligation as a citizen to give testimony. Finding that the State's interest in protecting the confidentiality of its termination of parental rights proceedings to be sufficiently compelling to outweigh Petitioner's First Amendment rights, the trial court ordered Petitioner to testify to disclose his source. Clearly, Petitioner is *not* being punished for the publication of this information, rather he is being sanctioned for his willful refusal to comply with the court's order.[2]

Certainly, when sensitive information rests in the government's hands, the government has the responsibility of protecting its confidentiality. Here, it is undisputed that the trial judge who entered the order in question took extraordinary steps to ensure his order was not disclosed to the

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2 Petitioner argues that the true issue at stake was not the State's interest in protecting the privacy rights of participants in termination of parental rights proceedings, but merely a general intent in the orderly administration of justice, asserting that F.S. § 39.411 and § 39.467 are mere records-keeping statutes. However, nearly identical provisions of Florida's Statutes have survived constitutional challenge and have expressly been recognized as having been enacted to protect parties to adoption, child dependency, and here, termination of parental rights proceedings from harmful publicity. *In re Adoption of H.Y.T.,* 458 So.2d 1127 (Fla. 1984); *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988). Clearly the statute in question is not a mere records-keeping statute, but is in fact a statute enacted by Florida's Legislature to serve the compelling interest of privacy in family matters. As noted in the District Court's opinion the rights of minors herein to confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's disclosure..."such action on his part was not qualifiedly privileged." 589 So.2d at 978.

public. He did not enter another order sealing the termination order, as the proceedings and files were closed to the public by statute. Copies of the order were reviewed by various employees of the clerk's office and HRS employees. There was no evidence however, that any of these employees violated the statutory proscription by allowing the public to view the order. While it is not known whether the contents of the order were discussed by anyone who viewed it, there is no evidence that it was. Moreover, there is no record evidence dispositive of this issue because the thoroughness of Respondent's investigation below was not a contested issue; rather Petitioner stipulated that Respondent had exhausted all alternative sources for the information as to who had disclosed the order to him.[3]

Respondent is not attempting to punish publication of the confidential information unevenly or unfairly. Respondent is seeking the identity of Petitioner's source in order to prosecute those persons and/or rectify those procedures which unlawfully permitted disclosure of the confidential order to Petitioner. Petitioner, in failing to comply with the trial court's order to disclose *how he secured* the confidential information, is, like any other citizen, being sanctioned for his conduct in refusing to obey the lower court's order.

Lastly, Petitioner suggests that the statute in question, which prohibits disclosure of confidential information by all who have access to it, does not really protect any privacy rights because the statute allows disclosure of the information to the child, his parents and their attorneys. Of course the parties to and subjects of the litigation (and their counsel)[4] are entitled

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3 Additionally, because Petitioner agreed to the facts below, he can not legitimately ask this Court to assume that the government failed in its duty to maintain the confidentiality of these documents.

4 Obviously the attorneys are bound by their ethical obligations not to disclose this information, and are equally subject to sanctions for violation of this ethical duty.

to access to this information. Simply because the *parties* to this type of action have access to this information does not mean that anyone else is entitled to disclose this information, or that the litigants' privacy rights are not protected by the statute. While it is true that one whose confidential records have been published does not have a cause of action against a newspaper who prints them, that person *does* have a cause of action against the person who *discloses* them. *Cape Publications, Inc. v. Hitchner* 549 So.2d 1374 (Fla. 1989).

More importantly, the rights of children have *always* been of primary concern to the courts of this country. In *New York v. Ferber,* 458 US 747 (1982) this Court held:

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." [citations omitted]. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." [citations omitted]. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

Ferber at 756-757. See also: *Maryland v. Craig,* 497 U.S. ____, 110 S.Ct. ____ 111 L.Ed.2d 666 (1990), (State's interest in protecting the physical and psychological well-being of child abuse victims sufficiently important to outweigh a defendant's right to face his accusers in court); *Osborne v. Ohio,* 495 U.S. 103 (1990), (State's compelling interest in protecting the physical and psychological well-being of minors sufficient to outweigh a defendant's First Amendment

rights); *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), (Government's interest in the well-being of its youth justified restrictions on broadcast of materials protected by the First Amendment); *Prince v. Massachussetts,* 321 U.S. 158 (1944), (where the State's interest in protecting welfare of children sufficient to outweigh parent's religious beliefs); *Globe Newspaper Co. v. Superior Court,* 451 U.S. 596 (1982), (State's compelling interest in the physical and psychological well-being of minor victims of sex crimes sufficient to justify depriving the press and public of constitutional right to attend criminal trials). Since the courts and government stand *in loco parentis* with respect to the rights of children, the purpose of the statute here in question, clearly was of the highest order in protecting the child's privacy rights. Thus the trial court properly found that purpose outweighed Petitioner's privilege not to reveal his confidential source.

C. Fundamental Constitutional Interests Are Not Seriously Threatened When A State Prosecutes A Reporter For His Refusal To Disclose His Source After Applying This Court's Balancing Test As Enunciated In *Branzburg*

Petitioner again asserts that he is being sanctioned for his publication of truthful material. However, a review of the order holding him in contempt, the decision of the Fourth District Court of Appeal, and particularly the arguments contained in his own briefs in this cause, clearly reveal that this contention is simply untrue. The order, holding Petitioner in contempt, sanctions him for his refusal to identify the source of a confidential court order. The contempt order was entered after notice and hearing, and after consideration of the principles enunciated

by this Court in *Branzburg v. Hayes, supra.* As the decisions below conform with principles established by this Court, Respondent submits that the Petitioner has not demonstrated a basis upon which relief may be granted.

CONCLUSION

Wherefore, for the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Case No. 92-373

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October Term, 1992

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BRIEF OF RESPONDENT IN OPPOSITION

APPENDIX

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IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN
AND FOR MARTIN COUNTY, FLORIDA

FELONY DIVISION

IN RE: INVESTIGATION: FLORIDA
STATUTE 27.04, SUBPOENA
OF TIM ROCHE.

TIM ROCHE'S MOTION TO QUASH SUBPOENA/MOTION FOR PROTECTIVE ORDER

TIM ROCHE, by and through his undersigned counsel, moves the court for an order quashing a subpoena served upon him by the office of the state attorney, and that the court otherwise enter an appropriate protective order, and as grounds therefor would show that:

1. TIM ROCHE is a reporter for the Stuart News.

2. The Office of the State Attorney, by and through Richard Barlow, Assistant State Attorney, has served upon TIM ROCHE a witness subpoena, commanding TIM ROCHE to appear before the state attorney on September 7, 1990, at 10:00 a.m.

3. This subpoena was served on August 7, 1990.

4. Though Assistant Attorney Richard Barlow has refused to disclose the subject of the "investigation" to which the subpoena is directed, TIM ROCHE believes that the investigation concerns an inquiry into the source of his news account of an order entered by Judge Kanarek terminating the parental rights of Cheryl Puffenburger, which story

appeared on page A1 of the May 30, 1990, edition of the Stuart News. A copy of that story is attached as Exhibit 9 to the Memorandum of Facts and Law contemporaneously submitted with this Motion.

5. Specifically, TIM ROCHE believes that the purpose of the subpoena is to force him to testify as to the identity of the member or members of the class of persons having access to the order which is the subject of the May 30 news story. That order was officially closed to public inspection pursuant to Florida Statute § 39.411.

6. TIM ROCHE enjoys a qualified privilege to withhold information concerning confidential sources for his news story.

7. Prior to compelling TIM ROCHE to reveal such information, the party seeking the testimony has the burden of clearly demonstrating that:

A. The reporter possesses information relevant to an investigation;

B. That the state has a compelling need for the information the reporter may have; and

C. That all alternative sources for the information have been exhausted.

8. The state cannot demonstrate any compelling interest that identification of ROCHE's source or sources would serve.

9. The State cannot demonstrate that the information it seeks is not available elsewhere.

10. Submitted contemporaneously with the filing of this Motion is a Memorandum of Facts and Law in support of this Motion to Quash/Motion for Protective Order. The contents of that Memorandum are hereby incorporated by reference.

WHEREFORE, TIM ROCHE respectfully requests the court to enter an order quashing the aforedescribed witness subpoena, and to enter an appropriate protective order, and that the court grant such additional relief as the court deems appropriate under the circumstances.

/s/

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IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN
AND FOR MARTIN COUNTY, FLORIDA
FELONY DIVISION
90-1290 CFA

IN RE: INVESTIGATION:
FLORIDA STATUTE 27.04
SUBPOENA OF TIM ROCHE.

HEARING OF SEPTEMBER 18, 1990 AND NOVEMBER 2, 1990

This case came before the court for hearing on September 18, 1990, before Honorable John G. Ferris, Circuit Judge, and November 2, 1990, before Honorable Robert R. Makemson, Circuit Judge, at the Martin County Courthouse, Stuart, Florida.

Appearances were as follows:

FOR THE STATE:

Richard Barlow
Assistant State Attorney
Stuart, Florida

FOR THE DEFENDANT:

Robert Lord, Jr.
Attorney for Defendant
Stuart, Florida

THE COURT: Alright, Tim Roche.

MR. LORD: Your Honor, my name is Rob Lord, I'm counsel for Mr. Roche.

THE COURT: Mr. Lord. I received this morning your memo so I have to (indiscernible) just skimmed it and have not had an opportunity to study it. I have not studied Mr. Barlow's although I flipped it, but I haven't had an opportunity to study it. Gentlemen, go ahead.

MR. BARLOW: Your Honor, we are here today on the order to show cause which was issued by Your Honor as to Mr. Roche—as to Mr. Roche as to why he should not be held in contempt of Court for failing to provide answers to the questions as to the source and identity of the person who provided Mr. Roche with a confidential order which had been issued by Judge Paul Kanarek on May 29, 1992.

The State, Your Honor, in this hearing seeks to compel Mr. Roche to provide the source and identity of the person who provided Mr. Roche with that confidential order which was written by Judge Kanarek and it was sealed in the Court's files and it was limited in its review and given to only certain parties in the case, the attorneys and HRS in the case and not allowed to be given to the press and to the public. And, Your Honor, that's what brings us to the Court today.

MR. LORD: Your Honor, as sort of a follow-up to that by way of procedural background. A subpoena was served on Mr. Roche to ask him to testify. We filed a motion to quash that subpoena and a motion for protective order. As a courtesy to the State Attorney's Office, however, we did appear before Mr. Barlow to permit him to prepare or to create a

record for the order to show cause so that we could dispose of this all at one time.

THE COURT: Uh-huh.

MR. LORD: And we believe procedurally what—this is sort of the chicken before the egg argument, but that the motion to quash should be heard first. What we do get into here is a Constitutional analysis and it involves the application of the three-pronged test. The State is prepared to present testimony regarding the third prong of that test, that prong is that they have exhausted all available other sources for the information that they are seeking. We are prepared to stipulate that they have done so for the purposes of this hearing in an attempt to short circuit maybe this three hour hearing and cut it down considerably. We have no evidence to submit in opposition on that point and we would ask the Court to concentrate on the second prong of the three-prong test and that's what our memorandum is directed primarily.

THE COURT: Uh, do you want to proceed on your motion to quash?

* * *

MR. LORD: Your Honor, if we could proceed with argument on motion to quash.

THE COURT: Alright.

MR. LORD: May it please the Court, Counsel. Your Honor, as we have seen the dispute underlying the subpoena in question, again in November of 1988 when a child was tragically beaten to death at the home of her mother and stepfather. HRS, according to this witness, first gained knowledge of child abuse in the home in June of 1988 and from June in '88 to the death of the child in November '88, there was a case worker assigned to the matter. The HRS

records, as indicated in the articles that have been submitted and are attached to our memorandum of law, suggest that H—the HRS case worker did not see the deceased child after September of 1988. In fact Mrs. Puffenburger, the mother, indicated that on—at no time did the case worker ever see the children. These facts received widespread publicity at the time of the death of the child. An example is contained in Exhibit 1 to our memorandum is an article entitled "HRS Supervisor Probably Won't be Disciplined". Another example is Exhibit 2, an article entitled "Child Abuse Death Spurs Frustation", a *Stuart News* article of June 4, 1989.

Your Honor, both parents were subsequently arrested on aggravated child abuse charges. The arrests received widespread publicity in all newspapers in this community, including the *Stuart News*. An example is Exhibit 4 to our memorandum.

Later the father is sentenced to a ten year jail term, the mother is sentenced to a nine month jail term. Both of those events incurred widespread publicity. There was an enormous amount of public interest and publicity arising out of these proceedings. Examples are also contained in Exhibits 5 and 6 to our memorandum.

Immediately after the death of her child, her half-sister becomes a ward of the State and HRS pursues a proceeding to terminate the parental rights of both parents. This proceeding received widespread publicity. As the witness indicated unlike other proceedings that have been closed for some reason HRS talked about it and the parents talked about it and the grandparents talked about this case.

Again, there was tremendous publicity—tremendous public interest and concern about the child, about HRS's handling of this matter, about the prosecution of the parents, about how this could happen.

Judge Kanarek's office reported receipt of approximately 45 letters. HRS reported receipt of approximately 50 letters inquiring as to the welfare of the child. The *Stuart News* attempted to keep the public informed. Over 40 articles were written in the *Stuart News alone* on this particular set of facts.

Four days before the hearing where the parental rights were terminated, the mother invites a reporter from the *Stuart News* and a reporter from the *Palm Beach Post* to speak with her about that hearing. That article from the *Stuart News* is attached to our memorandum. At that time she says that HRS is seeking to terminate her parental rights. That this is due to widespread community interest.

As previously indicated, the Court terminates the mother's parental rights, Mr. Roche authors an article published on May 30, 1990, disclosing the contents of the order and the State now wishes to compel Mr. Roche to reveal the source of the order.

Judge, that leads us to the Constitutional argument that we had in front of the Court. Reporters in Florida enjoy a qualified privilege not to disclose their confidential sources. There are two cases that we would cite for this proposition. *Tribune Company v. Huffstetler,* a Florida Supreme Court decision from 1986 at 489 So.2d 722. Also the case of *Morgan v. State,* a Florida Supreme Court decision from 1976.

The privilege is based upon protections of the First Amendment. The Florida Supreme Court in fact in 1990 has decided a case, *Miami Herald Publishing Company v. Morejon,* located at 561 So.2d 577 that indicates that that is the basis. But as it arises out of the *Branzburg* decision—

THE COURT: Well, *Morejon* is a little bit different.

MR. LORD: Oh it is.

THE COURT: There the—the reporter was an actual eyeball witness who attempted to evade being subpoenaed to testify as a witness.

MR. LORD: A very much different set of facts.

MR. LORD: The only reason why I cite that case to the Court is the Court comes out and says this is based—the privilege is based on the First Amendment.

THE COURT: Yes.

MR. LORD: And that language is in the case, but as the Court indicates, that case is clearly distinguishable.

THE COURT: Yes, but the Court went on to say in that particular instance, news media enjoy no greater protection than anyone else.

MR. LORD: Absolutely.

THE COURT: They are required to testify as anybody else in *Morejon*. They affirm the Third District in that case.

MR. LORD: Yes, Your Honor. That's the only time you're going to hear form me about that particular case.

THE COURT: Yeah, I know. It's not a very, uh—

MR. LORD: Your Honor, you will hear from me about *Huffstetler* and *Morgan* case.

THE COURT: I—I'm familiar with *Huffstetler* and *Morgan*.

MR. LORD: Okay. Well, there's a three-prong test that has been applied in Florida that says we have to do three things (indiscernible). We must establish that the reporter possesses information relevant to the investigation, we must demonstrate, most importantly, that the State has a compelling need for the information the reporter may have and

three, that all alternative sources for the information have been exhausted.

Well Judge, we're going to concentrate, if we can, on that second element. As we've indicated, we're stipulating that that third element has been satisfied. Clearly, the reporter has relevant information.

We would suggest, however, that the Court cannot establish the compelling need. The State's position as is outlined in its memorandum of law fails to focus on this particular case. They cite this all encompassing statute and say that by virtue of the statute and the statute alone and the need to protect the interest of children in general, that there is a privilege—that they can pierce this privilege. It's argued that this Court's primary concern should be that which is in the best interest of the child. We would agree that the Court should be concerned with the best interest of the child—of all children who are wards of the State. That's not the argument that we're making.

In both *Morgan v. State* and *Tribune Company v. Huffstetler,* the Florida Supreme Court quoted from Justice Powell's opinion in *Branzburg v. Hayes,* which is U.S. Supreme Court decision 408 U.S. 665. And I quote from *Huffstetler,* "Justice Powell made it clear that every such claim of privilege should be judged on its facts by the striking of the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

Your Honor, we could go through a long argument about what has happened in the past decade, I'm sure the Court is aware—everyone is aware, child abuse cases have come to forefront of our society. The press reports on them. The State has made quite an effort to punish the perpetrators of this awful crime and they have done that publicly.

The child abuse case in question here, as was indicated by the last witness, has been at the forefront of this community's attention for almost two years now. Since November of 1988 it is—well over 100 articles I would submit have been written in all the newspapers.

The Stuart area residents have been justifiably concerned about what happened here, what happens to the child, what happened to the parents, how HRS handled this matter and whether they did a good job.

More importantly Judge, the child's mother and father and grandparents have done nothing to shield from the public the decision making process regarding her custody. They have openly discussed it, they've argued their positions to the press, they haven't tried to protect the interests of the child. All these matters have received tremendous publicity.

Indeed Charlotte Mae's mother held a press conference just four days before the termination proceeding and discussed what HRS was trying to do. Through her public statements and the statements of her attorney, certainly the mother has waived any privacy right which she may have had.

The father through his voluntary public statements from calling the *Stuart News* and the *Palm Beach Post* from his prison cell, has waived any privacy right which he may have had.

So the State is back to the position—and they've taken the position they are protecting the child here. That it's necessary to protect this infant child. However, the actions of the parents in openly discussing the matter has destroyed that interest. Any damage to this child was done prior to the publication in question. All of the criminal prosecutions and the HRS proceedings and their discussions of the facts—open discussion of the fact that they perceive her as being unfit as a parent. I would respectfully disagree with the

testimony of the witness. That it would be worse to find that this order had been entered as opposed to the fact that your mother had been sentenced to jail for neglect and for allowing your half-sister to be beaten to death. I find that argument a difficult argument to believe. And that your father had been sentenced to ten years in prison for aggravated child abuse.

Whatever purpose enforcement of the sealed record statute might have in another case, and I will agree with the Court and with opposing counsel that there are circumstances when this statute would—would carry out it's purpose. But whatever purpose it might have in another instance, it had—does not carryout that purpose here. It serves no purpose in this case.

Your Honor, a factually similar case was decided, *The Tribune Company v. Huffstetler,* and the Court is familiar with that case. There—that was—

THE COURT: Mr. Lord, can I interrupt?

MR. LORD: Yes, Your Honor.

THE COURT: Cause you've struck on a point. You said whatever the Court decided has no application here. Now I assume that you're saying, and if you're not then correct me, that the respondent knew that Judge Kanarek had made the order confidential and yet nevertheless went ahead and however he obtained the copy, and that we'll get to—another crime, but however he obtained it, published it knowing that Judge Kanarek had ordered it made confidential. Now in the orderly process even though we are dealing with a First Amendment apparatus, wouldn't it have been better if Judge Kanarek's order had been appealed or attempted to be modified before completely disregarding that portion of the order?

MR. LORD: Your Honor, if I misspoke myself, I—

THE COURT: Well, that's what I gathered.

MR. LORD: The point I was trying to make was that whatever the purpose of enforcement of this sealed record statute may have in another instance, it doesn't serve that purpose here because all of the matters have previously been disclosed. In—in all other cases that the witness is familiar with and that I am familiar with, uh, there hasn't been this tremendous public outcry and this public discussion.

THE COURT: Well, I'm sure—

MR. LORD: That was—that was—

THE COURT: I'm sure that that's true.

MR. LORD: That was merely my point. That the enforcement of the statute here doesn't accomplish the same purpose that it would in 99.9 percent of the other instances.

THE COURT: But there was a judicial determination that it should be made confidential in accordance with the provisions of the juvenile procedure statute, wasn't it?

MR. LORD: Absolutely, Your Honor.

THE COURT: And the respondent was ware of that. I can only assume that from what you have said. That being true, wouldn't that have been the more prudent and wiser—you're quarreling I think with the decision of the Judge an maybe you're correct—

MR. LORD: No, Your Honor.

THE COURT: Well, you may be correct—yes, you are because you say that the previous matters that have been already disclosed were far more, uh, well onerous and odious than the matters that were contained in this order so that really there was no damage.

MR. LORD: No, Your Honor. I'm not quarreling with the Court's decision or the Court's decision to make that order confidential.

THE COURT: Because this—

MR. LORD: And—and—that is not my quarrel. Judge Kanarek did absolutely what he should have done, the law requires him to do what he did. As an officer of the court, I would obey that statute and would never reveal the contents of that order and would hope that no officer of the court would do that or that anyone else would do that. It did happen here. It was revealed to a reporter of the *Stuart News* who published it.

The question before the Court is not whether or not it would have been more prudent. And again as an attorney, I would agree with the Court's proposition that it would have been more prudent to wait for that to happen. It didn't happen here. And now the question is whether or not the reporter can be compelled, uh, to reveal it.

Uh, Judge what you say, uh, that was appropriate—I saw—I don't do this very often, but I was going to use this in rebuttal, but you may find this amusing. Alex Datortville (phonetic) a Frenchman who wrote extensively on the United States once said—

THE COURT: I've read some of his writings.

MR. LORD: He said, in order to enjoy the inestimable benefits that liberty of the press insures, it is necessary to submit to the inevitable evils that it creates. And I'm not saying that an evil was created here. I certainly would not concede that. But the fact is what we're arguing here is the freedom of the press and the First Amendment and balancing that against—

THE COURT: I—I have no quarrel with the First Amendment. I believe that to be a very valuable right that has to be protected and nurtured. I agree. The Supreme Court of Florida, the Supreme Court of the United States has spoken to that issue and I subscribe to it completely. However, there are other intervening rights and obligations that are interwoven between the obligations that are raised by the First Amendment and that's what we're weighing now.

MR. LORD: Absolutely.

THE COURT: I'm sure you realize that.

MR. LORD: Yes, Your Honor.

THE COURT: I—I have no quarrel with First Amendment rights. I don't belittle them and I don't ridicule them and I don't minimize them.

MR. LORD: Your Honor, it's, you know, as we see it, I see the *Huststetler* case as a case that is analogous to the case that you have here. There you have a Taylor Tribune reporter that obtains through a confidential source information about an ethics violation and a complaint made to the ethics commission, that is by statute—the statute prohibits the disclosure of that—we've got politicians who, I would imagine, jealously guard their reputations and their right to privacy.

THE COURT: There is some analogy between the *Huststetler* case, you're right.

MR. LORD: And in fact, the complaint is dismissed by the Ethics Commission basically a failure to demonstrate any cause—probable cause sufficient to go forward. There's the statute that prohibits the disclosure of the information, the reporter is subpoenaed by the Assistant State Attorney, just like you have here, the reporter moves to quash. Unfortunately, in that case the Circuit Court did find the reporter

guilty of civil contempt and denies the motion to quash, goes to the Fifth District—excuse me Fifth Cir.—yea, Fifth District Court of Appeals, they affirm the trial court's decision, it goes to the Florida Supreme Court. The Supreme court frames the issue as whether or not there is a privilege when subpoenaed in a State Attorney's investigation against revealing the identity of a source whose information violated Section 112.317. And we can just take that issue and substitute in the pertinent statute here and we have the issue in this case.

In *Tribune Company v. Huffstetler,* the Court holds—Supreme Court holds the privilege prevails. Accordingly, they quashed the District Court's decision and the reporter's contempt conviction was reversed. They, again in that case as I previously indicated, said you gotta judge each case on its own particular facts. And as we previously indicated, the participants in that case jealously guarded their reputations and their rights. They were terribly upset. Here the parents have openly discussed the matter so there is a distinction to be drawn, but it is in favor of Mr. Roche, not against him. There is no evidence that the parents jealously guarded their reputations.

In *Huffstetler* the Court also said something else. They said that in that case the "societal interest under pending most criminal statutes" was not present. And I would submit that the same is true here. The—most criminal statutes are based on conduct other than the conduct of the nature of what we have here. The disclosure of a court order is based on—I don't know how to describe the conduct—I know a crime when I see it. But there's a different societal interest in enforcing the criminal statutes or what you have in *Morejon v. Miami Herald Publishing Company* or someone is an eyewitness to it than what you have here where someone discloses confidential information.

We would submit that no one was injured by the disclosure of this information. Indeed in light of the enormous publicity, it could be argued that societal interests were served by the disclosure of this information for a very powerful message was sent to all Floridians. And that message was you can't abuse your children and maintain your parental rights. Certainly the privacy rights of the child had already been violated by others.

The State sort of in their memorandum anyway comes at it from a little bit different direction. They say we don't have to concentrate on this child so much as we can look at all children or future incidents.

But both the United States Supreme Court in *Branzburg* and the Florida Supreme Court in *Huffstetler* clearly stated that you gotta judge each one of these on its own merits.

And in *Morgan v. State,* the Court goes further. It says, "we cannot accept the view that generalized interest and secrecy of governmental operations" in that case I believe it was the grand jury proceeding "should take precedence over the interest in assuring public access to information that comes to the press from confidential informants. Citing non-specific interests even in keeping the inner workings of the Pentagon secret have been held insufficient to override First Amendment interests.

Now in *Morgan* you've got a reporter, the State Attorney seeks to hold him in contempt, uh, for refusal to disclose information regarding a grand jury presentment. There we have a presentment that in it is, uh, critical of an unindicted person, the Chief of Police of Dade County. Uh, and the—it was a State Statute that says the grand jury presentments that are critical of unindicted persons won't be disclosed until those people have had an opportunity to move, I believe the statute uses the word, repress that information or move to repress it, Section 905.28.

In *Morgan* the criticism of the Dade City Chief of Police was published before he has the opportunity, his name was Mr. Nixon, and the Court noted that Mr. Nixon's apparent loss of this right of privacy was the only specific interest that had been alleged. The *Morgan,* Court notes that there was never any specific showing that the Chief of Police suffered actual harm. The implication of *Morgan* is that you've got to demonstrate the actual harm. Based on the record before the Court in *Morgan, Morgan* decision held in favor of the reporter. And *Morgan* notes in a rhetorical question, if the mere possibility of injury to private reputation is—justifies (indiscernible) that a reporter divulge his sources, in what circumstances would a reporter not have to give the names of his confidential informants? The Court goes on to answer that rhetorical question. It says "the First Amendment is clearly implicated when government moves against a member of the press because of what she has caused to be published. These contempt proceedings were not brought to punish violation of a criminal statute and were not part of an effort to obtain information needed in a criminal investigation. Their purpose was to force a newspaper reporter to disclose the source of public—publish information so that the authorities could silence the source". The present case falls squarely within the language of *Branzburg* which says, official harassment of the press undertaken not for the purpose of law enforcement, but to disrupt the reporters relationship with his new sources would have no justification.

Your Honor, this isn't a criminal statute we're investigating here. The punishment for this is contempt in the other proceeding. The question is raised how this subpoena issued in this independent criminal investigation when in fact there's no criminal statute being investigated. The punishment is contempt for revealing the information, but it's not contempt against my client. The subpoena should have been issued in the dependency proceeding and the investigation should have flown out of that.

That fact notwithstanding, we're before the Court today. The purpose of this investigation is to silence the source. It's not to punish anyone, it's not because this man violated a criminal statute, it falls squarely within this language in *Morgan*. And we would suggest that *Morgan* and *Huffstetler* control this situation. They are extremely close on the facts.

Now Your Honor, we have filed an extensive memorandum of law with footnotes and articles attached and they discuss several other cases, all of which we contend support our position and we would ask if the Court would take the time to review that—

THE COURT: I'm going to Mr. Lord. I appreciate both of you have filed a rather extensive brief and I have not had the opportunity to really study it in any detail, which I am going to do. But I appreciate your remarks here because I am very concerned with this case—

MR. LORD: Thank you, Your Honor. And I would commend opposing counsel for the brief that they have filed. I believe that we do not have an intelligent discussion of the issues here before the Court in those briefs.

But Your Honor if I might in closing indicate—

THE COURT: Yea.

MR. LORD: The press is always going to publish materials with various branches of our government and even those of us who are not in government are going to find displeasing. Whether those people are presidents or legislators or governors or judges. And obviously Judge Kanarek found this displeasing and I don't blame him. Nevertheless, Your Honor, our forefathers sought to adopt the First Amendment to the Constitution because they recognized that a free press was essential to informing the public and to run our democracy. And I believe it was Thomas Jefferson who said in 1787, if it were left for me to decide whether we should have a

government without newspapers or newspapers without a government, I would not hesitate a moment to choose the latter.

In light of the facts surrounding this case, Judge, there's been no damage, there's no societal interest that's going to be supported by enforcing this statute under these circumstances, not in light of the conduct of the parents and the conduct of HRS and the conduct of the State Attorney's Office in prosecuting this matter and openly discussing it with members of the press, not in light of all the articles that have been published regarding this child.

We would respectfully request that you enter an order quashing this and otherwise protecting Mr. Roche against the inquiries of the State as to the sources of this confidential information. And, Your Honor, I do appreciate your time.

THE COURT: Mr. Barlow.

MR. BARLOW: If it please the Court, Mr. Lord, Your Honor. Judge, we have in this case not only the societal interest in protecting children, but the interest of protecting Charlotte Puffenburger. That was the interest that Judge Kanarek had as he sat where you sat in closing this proceeding to the public, to the press and not allowing that to be published as to what his ultimate opinion would be in the case and his order in the case. Because he recognized that Chapter 39 of Florida Statutes provided by the Florida Legislature to protect children, the Legislature from acting to protect children.

What we have here today, Your Honor, is if we allow the press to go behind Judges' orders, to go behind the Florida Legislature and disregard Chapter 39, they simply then can violate the Judge's order at anytime they choose. Publish the order because they feel it is in society's interest to publish what the Judge said they could not, rather than appeal that

Judge and take that Judge to the appellate court on that issue in advance, which could have been done in this particular occasion. They could have contested the closure of the proceedings to the public immediately to the Fourth District Court of Appeal, they chose not to do so. What they choose to do so was to go behind the Judge's order, go behind Chapter 39, obtain a copy of the order in the manner in which they did and then publish it.

Your Honor, not only did they publish it, but they flaunted their actions. If you look at—and Mr. Lord has provided a copy in one of his exhibits, Your Honor, the article from May 30 in the *Stuart News* which Mr. Roche wrote is this. "Kanarek's order was sealed from public inspection Tuesday because of the State's statutes requiring confidentiality in termination cases, but a copy was obtained by the *Stuart News* in St. Lucie News". They flaunted it—they flaunted it that the Judge required it to be closed to protect the child and yet they still said, but we got it anyway and we're going to publish it.

That means Judge that Chapter 39, the Florida Legislature's determination upheld by the Florida Supreme Court and the confidentiality of those proceedings is worthless. Mr. Roche has decided on his own to take Chapter 39 and destroy it. He doesn't care about the confidentiality of Charlotte Puffenburger or any child in any future proceeding. And that's the danger that he himself as a member of the press has made a decision that the interests of the child are outweighed by society's interest. Rather than letting the Courts make that determination in a hearing before the justices which have the highest standard of duty of protecting all of society's interest and rights. He alone has made that decision in advance. And that is total improper. We would do away with Chapter 39 and the legislative acts, we would do away with the Florida Supreme Court holding that Chapter 39 has provisions for confidentiality and closure

which are proper and he has made that decision on his own that he is not going to follow those regulations.

Your Honor, we go back to *Branzburg* case and that is a case by case analysis and that is what we are asking you to do in this case. Looking at this case on a case by case analysis to determine whether or not the limited qualified privilege which the press enjoys in certain circumstances shall apply in this particular case. And I would suggest strongly, Your Honor, that it should not and does not in this particular case.

The qualified privilege does not apply in this case, Your Honor, because Mr. Roche is more than a reporter. He is in fact as in *Morejon,* a witness. He is a witness because he did not just have a confidential source in this case that told him something, he had a source which provided him illegally with a copy of the order. An order that had been sealed by Judge Kanarek. Provided him physically a copy of the written order. That is an act—not just a source but an actual act in violation of Chapter 39. That is the criminal act we have in this case. The act which Mr. Roche was a witness to. He is alone the source who can provide who is that person that provided the copy of that order in this case.

In that respect it's very similar to the *Morejon* case, he is a witness to the receiving of a physical object in this case and that makes him under the *Morejon* case—has no privilege. But assuming that he has a qualified privilege, Your Honor, that he has a qualified privilege, then that qualified privilege of the First Amendment is not stronger—is not higher than the rights and protections that the Florida Legislature has given to children and given to the trial judges of this State to protect those children. In which Judge Kanarek attempted to protect those children and attempted to protect the child in this case by closing these proceedings.

We had guardian ad litems appointed to protect the children, we had Judge Kanarek protecting the interest of the

child. Because as the guardian ad litem said in this particular case Judge, yes there had been prior publicity in this case, but the most damaging thing in this case was to the esteem of the child when a Judge said your mother wasn't protecting you, your father wasn't protecting you. Those words published in the newspaper, which couldn't have been published without obtaining a copy of the order were published. And that was the destruction to the esteem of Charlotte Puffenburger.

But it goes not only to the danger of Charlotte in this case, but the danger to violations of Chapter 39 across the board, all across the State and certainly within this circuit. That is the danger we are facing in this case if we allow the press to go behind Judges' orders.

Your Honor, there certainly is no chilling effect in this case. Mr. Lord didn't use the words chilling effect, but that's certainly what the *Branzburg* case talks about. For the *Branzburg* case and the concurring opinion of Justice Powell is very strong on that. There are mechanisms within our system to quash subpoenas, to protect and go before the judges of this State to protect the interest of both the press and the general public. If they believe that the State Attorney's Office is attempting to chill their sources, they can certainly come before Your Honor or any other judge and attempt to quash those subpoenas or move in another mechanism to prevent the State from subpoenaing them to reveal their sources in the appropriate cases.

The *Branzburg* case, however, did not give the press free reign. They recognized only a qualified privilege under the First Amendment.

And the Florida Supreme Court noted in the *Morejon* opinion, in the footnotes in that case, is that the Florida Legislature refused to adopt a shield for reporters, a privilege and put it in our evidence code or adopt a statute of

shield in that case because their rights only stem from the First Amendment—no additional source in Florida law. And that that is only a qualified privilege.

Your Honor, you're being called upon in a difficult job to weigh the First Amendment versus society's interest in children—Charlotte Puffenburger's interest in this particular case. The Florida Legislature has said, Chapter 39 is the tool that shall be used by the judges of this State to protect children. Judge Kanarek used Chapter 39 to protect children. Mr. Roche acting in his reporter capacity decided not to listen to Judge Kanarek or follow the Florida Legislature and act on his own and obtained that order in this case.

Mr. Lord argues that the publicity in this case—the damage was already done in advance he said. The damage was already done due to the widespread publicity. The damage was done—if he's saying the damage was done and he did, the damage was done by Mr. Roche and the members of the press. The damage wasn't done by anyone else. They were the persons that reported it and caused the damage in this case. And what they are arguing is, since we already caused the damage, we couldn't cause any further damage so what does it matter that we violated Chapter 39? What does it matter that we violated the Judge's order? The damage was already done. What they are saying is that they can get away with things and violate a person's rights—the laws of the State and the Judge's order, then it's ha-ha-ha, it's too late, the damage is already done. And that is a sad situation because members of the press also have to follow the law in this Country. And that you, Your Honor, have to weigh and balance whether the First Amendment in this case or the rights of Charlotte and children in this particular case and children in other situations protected by Chapter 39 and the Judges in this State are to be given—be given (indiscernible) and strength in this case or whether the press can make on their own decisions to go behind the law.

Your Honor, I would suggest that there is no more valuable resource in our society than children. And that's why we move to protect them and keep these things confidential.

The press decided on their own in this case that the child's interest was outweighed by the public's interest in a case. The public's interest that they created through their publicity and that they continue to foster through their publicity. It may be appropriate in some circumstances, but not when you damage the life of a child that has to go through life damaged with esteem.

And not only in this case but in all cases of children. We have to look at the long-term interests of the children and the long-term interest of society. And that is not done by the press. They're interested in doing their job, writing an article, satisfying their editor and getting it out regardless of whose toes, judges or the legislature, that they step on.

They should have taken the appropriate actions to the appellate courts in this case. Challenge the closure of the hearing, challenge the closure and the sealing of the order in this case and they failed to do so. If there was so wide interest of publicity in this order and in this case then that interest would have remained when the appellate court reached their decision. It would have remained six months from now, six weeks from now, it would have remained when the appellate court made its decision. But they elected to be the ones that could flaunt it in the papers saying it was sealed but we got it anyway and we published it, ha-ha-ha. That is serious because it damages the children of this State. Thank you.

THE COURT: Do you want to respond Mr. Lord?

MR. LORD: If I could very briefly—very briefly, Your Honor. Your Honor, Mr. Barlow stood up here and ripped up a piece of paper that had Chapter 39 just for the benefit of

my sight, I'm going to rip up the First Amendment. The question here is a balancing test. We're not saying the Court should throw out Chapter 39 and I'm sure Mr. Barlow is not saying we shouldn't have the First Amendment to the Constitution.

Mr. Barlow really did not respond to *Huffstetler* or *Morgan,* except that he sorta seems to bring in the *Morejon* analysis. He says, wait a minute, this man is a witness to the crime. He physically got a copy of the order. That's the distinction that is drawn—the only distinction that is drawn.

In *Huffstetler,* the person was told something that violated—the reporter was told something that violated the statute.

Now lets look at *Morgan.* In *Morgan* where there is disclosure of information regarding the sealed presentment, and again we're dealing with a very similar set of facts, Statute says, shall not be revealed. In footnote 1 of page 952 the newspaper report was based on information that this passage was identified by petitioner as being based on confidential information. The grand jury reported, uh, criticized his officials but the jurors did level strong criticism at Nixon and other Dade County officials the *Times* was told. The jurors reportedly decided to keep a close eye on the Pasco County Building Department during the next 90 days and to meet again in the future to review (indiscernible). The unusual sealed presentment, reportedly was sealed at Williams' request. There you have a very similar case, the report itself—the newspaper article itself says I know that this is sealed, I know I shouldn't have this information. If they didn't see an actual copy of it, they came pretty close. They described in considerable detail what that presentment says.

The grand jurors were promised that its contents would be released within a week and it goes on. There's no distinction to be made here on the *Morgan* case The man is not

anymore a witness to the crime than the reporter was in *Morgan* or the reporter was in *Huffstetler.* It's a distinction without a difference, Your Honor.

My learned colleague has argued that generalized interest to protect the children should somehow prevail and again we would ask the Court to review the case law, specifically *Morgan* which says that you've got to focus on the particular case.

He seems to argue that the damage was already done, well it was done by the press because they wrote about it. The State Attorney's Office talked about it, HRS talked about it, the mother and father talked about it and the press wrote about it. A child died, that's worthy of press. It should receive press. And a powerful message needed to be send and was sent and the State Attorney's Office should be commended for that.

The fact is, Your Honor, regardless of what we personally feel about what went on here, we have to weigh the First Amendment and the protection that it affords.

That in these circumstances and in light of the law—in light of *Huffstetler* and *Morgan* and the other cases that we've cited to the Court, we would suggest they have failed to meet the compelling need requirement, prong two of that test. That this is an action that is merely intended to silence the source and not for a criminal prosecution and it's not a criminal statute.

It's a societal interest under pending most criminal statutes are not present here as indicated in *Morgan.* And for those reasons we would request that the Court grant the relief that we have sought. Thank you, Your Honor.

THE COURT: Thank you gentlemen. Uh, I'm going to take the matter under advisement and I'll rule as promptly as possible and I can't tell you when, it will be fairly shortly.

I appreciate the effort that you gentlemen have put into this case and, uh, I'm going to put forth the same effort. Thank you.

MR. LORD: Thank you, Your Honor.

MR. BARLOW: Thank you Judge.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO. 90-03071

L.T. CASE NO. 90-
1290CFA MARTIN COUNTY

IN RE: INVESTIGATION:
FLORIDA STATUTE, 27.04
SUBPOENA OF TIM ROCHE

Appellant,

vs.

Appellee.

AN APPEAL FROM THE CIRCUIT COURT FOR MARTIN COUNTY

APPELLANT'S INITIAL BRIEF

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* * *

PREFACE

The Appellant in this cause will be referred to herein as "Roche" and the Appellee shall be referred to as "the State." The following symbols will be used:

R.___ — Record on Appeal.

Tr.___ — Transcript of Hearings.

* * *

II. SUMMARY OF THE ARGUMENT

Under Florida law, records of termination proceedings are placed under seal and are accessible by only a small class of persons. *See* 39.411, Fla. Stat. (1982).[1] No legislative history exists to explain the purpose of requiring these records to be kept secret, but Florida common law indicates that statutes directing courts to place records in specific proceedings under seal are designed to protect the *privacy* interest of the parties to the proceedings. *See, e.g., Florida Star v. B.J.F.*, 499 So.2d 883 (1st DCA 1986), *rev'd on other grounds*, ___ U.S. ___, 109 S.Ct. 2603 (1989)(statute forbidding publication of name, address or other information identifying sexual offense victim enacted to shield information that is "of a

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1 The statute provides, in relevant part, that "The clerk shall keep all court records required by this part separate from all other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that . . . a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child." 39.411(c), Fla. Stat. (1982)

private nature"); *Cape Publications v. Hitchner,* 549 So.2d 1374 (Fla. 1989)(statute sealing records relating to reports of child abuse for purpose of protecting privacy of family). *See also* Tr. 10 (testimony of the Honorable Paul Kanarek that the purpose of § 39.411, Fla. Stat. (1982) is to protect "the participants and the child"). Thus, where, as here the parents in a termination proceeding have explicitly waived any "right to privacy" with respect to the proceeding, enforcement of the statute serves *no* legitimate purpose. Nevertheless, the State seeks to punish the source of Roche's information, and has seen fit to punish Roche in the interim for failing to identify that source.

Both the United States Supreme Court and this state's highest court have held that a "generalized" or "nonspecific" interest in keeping particular governmental proceedings secret is simply insufficient as a matter of law to overcome "the interest in assuring public access to information that comes to the press from confidential informants. . . ." *Morgan v. State,* 337 So.2d 951, 955 (Fla. 1976); *see Branzburg v. Hayes,* 408 U.S. 665, 710 (1972) (Powell, J., concurring) (a newsman's claim to the constitutional privilege to refuse to testify must be judged on the *specific* facts of the case, including the need of the government for the *particular* information the newsman possesses and whether the testimony will "implicate[] confidential source relationships"). [emphasis added]

In the proceedings below, the State failed to articulate a single *specific* interest that would be served by the forced disclosure of the identity of Roche's confidential source, and also failed to specify what compelling state interest would be advanced by that disclosure. The State therefore failed to shoulder its constitutional burden in this matter, for, under settled Florida law, disclosure of the identity of a confidential source may *not* be compelled *unless* and *until* the party seeking disclosure has shown that it has a compelling need for the information it seeks.

III. ARGUMENT

A. THE FEDERAL AND FLORIDA CONSTITUTIONS PROVIDE JOURNALISTS WITH A QUALIFIED PRIVILEGE TO REFUSE TO DISCLOSE THE IDENTITY OF CONFIDENTIAL OF CONFIDENTIAL SOURCES

In determining that the societal interests in this case outweighed the qualified privilege afforded Roche under the First Amendment and the Florida Constitution, the court below struck a constitutionally impermissible balance. Specifically, the court erroneously determined that the State's interest in protecting what is characterized as a generalized interest in children's welfare was a sufficiently compelling interest to overcome Roche's constitutional right to refuse to disclose the identity of a confidential source. The circuit court's decision should be reversed.

Under long-standing Florida law, news reporters enjoy a qualified privilege to withhold information concerning the confidential sources for their news stories. *See Tribune Co. v. Huffstetler,* 489 So.2d 722 (Fla. 1986); *Morgan v. State,* 337 So.2d 951 (Fla. 1976); *Gadsden County Times, Inc. v. Horne,* 426 So.2d 1234 (Fla. 1st DCA 1983); *Florida v. Abreu,* 16 Media L. Rep. (BNA) 2493 (Fla. 11th Cir. Ct. 1989). That privilege, as the Florida Supreme Court noted just last year, is based on "the protections of the first amendment to the United States Constitution and the corresponding protections offered by the Florida Constitution in article I, section 4." *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577, 579 (Fla. 1990). As the *Horne* court recognized:

> Subsequent to *Branzburg,* the trend among those courts that have addressed the issue of confidential sources is to recognize that a limited or qualified privilege does exist to protect the identity of

> such sources from forced disclosure absent a showing of compelling interest outweighing that privilege.

426 So.2d at 1237. The qualified privilege reflects the

> paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters . . . which has always been the principal concern of the First Amendment.

Baker v. F&F Inv., 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).[2] As a result of this "paramount public interest," the constitutions of both the United States and Florida require that *before* a journalist may be compelled to testify *in any proceeding*, the party seeking his testimony must provide substantive evidence that: (1) the reporter possesses information relevant to the proceeding; (2) the State has a compelling need for the information the reporter has; *and* (3) the party seeking the testimony has exhausted all alternative sources for the information. *See Horne*, 426 So.2d at 1241; *Tribune Co. v. Greene*, 440 So.2d 484 (Fla. 2d DCA 1983).[3]

Close appellate scrutiny of a trial court's adherence to the tripartite inquiry is particularly important where, as here, the information sought is the identity of a confidential news source, because, as the United States Supreme Court has held:

> official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.

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2 *See Branzburg*, 408 U.S. at 700 (requiring that a state's interest be demonstrably " 'compelling' " or " 'paramount' " "in order to justify even an indirect burden on First Amendment rights").

3 As Appellant has acknowledged, there is no dispute between the parties that the State has satisfied the first and third prongs of this test. R.38.

Branzburg, 408 U.S. at 707-708.

Whether the interest to be served by disclosure outweighs the reporter's qualified privilege must be analyzed according to the specific facts of the controversy at issue. The constitutional basis for such an inquiry can be found in Justice Powell's concurring opinion in *Branzburg,* 408 U.S. at 709-710, which was unequivocally embraced in *Huffstetler,* 489 So.2d at 723:

> the asserted claim to privilege should be judged *on its facts* by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

408 U.S. at 710 [emphasis added]. As Justice Powell noted,

> [t]he balance of these vital constitutional and societal interests on a *case-by-case* basis accords with the tried and traditional way of adjudicating such questions.

Branzburg, 408 U.S. at 710 [emphasis added]. *See Horne,* 426 So.2d 1234; *Morgan,* 337 So.2d at 955. Thus, as the Florida Supreme Court has held:

> We cannot accept the view that a *generalized interest in secrecy* of governmental operations should take precedence over the interest in assuring public access to information that comes to the press from confidential informants. . . . A *nonspecific interest,* even in keeping the inner workings of the Pentagon secret, has been held insufficient to override certain first amendment interests.

Morgan, 337 So.2d at 955 [emphasis added; citations omitted].

B. THE CIRCUIT COURT ORDER SHOULD BE REVERSED BECAUSE THE STATE CANNOT SHOW A COMPELLING NEED FOR ROCHE'S TESTIMONY.

The issue now before this court is whether the State's generalized interest in enforcing its laws is sufficiently compelling in his instance to overcome Roche's qualified privilege to refuse to name his confidential source. Tr.47, 49-51. Cf. *Morgan,* 337 So.2d 951.[4]

Appellant does not mean to suggest that the State's interest in enforcing its laws in general, or its interest in enforcing the particular law at issue here, is not an important and socially beneficial interest. However, the State did not (and cannot) show a compelling interest in the enforcement of laws within the framework of the *particular* circumstances of *this case.* The State therefore did not (and cannot) meet the constitutionally required burden it must shoulder in order to overcome Roche's privilege not to testify. *See Horne,* 426 So.2d at 1241.[5]

Given their extensive and deliberate contact with the press and the public, and the widespread notoriety of their case, both Cheryl and Carl Puffinberger clearly waived any privacy interest they may have had in the termination

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4 In *Morgan,* a newspaper published criticism contained in a grand jury presentment before the subject of presentment had an opportunity to file a response. In reversing the contempt conviction of the reporter who had refused to disclose the source of the grand jury information, the Florida Supreme Court implicitly held that neither the reputational interest of the subject of the investigation, nor the State's generalized interest in keeping grand jury proceedings secret were *sufficient* to overcome the interest in protecting confidential sources. 337 So.2d at 955-956.

5 Florida case law also suggests that the compelling interest to be served be demonstrably " 'immediate, substantial and subordinating,' " before disclosure may be ordered. *Morgan,* 337 So.2d at 955 n.10.

proceedings. R.77. Additionally, the State failed to demonstrate that any actual harm has occurred or would occur to Charlotte Puffinberger as a result of the publication by *The Stuart News,* and instead based its ruling on speculation and conjecture. Tr.56-59.[6]

Importantly, moreover, the State utterly failed to show how forcing Roche to reveal the name or names of his source(s) would served any socially beneficial purpose. The court below therefore improperly concluded that societal interests outweighed the first amendment interests in this particular case. R.108. Indeed, the circuit court failed to even mention Charlotte by name, much less identify specifically what harm had come, or could come, to her. R.106-109.[7]

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6 The State's Memorandum In Support Of Order To Show Cause fails to recite any harm whatsoever to Charlotte as a result of the article published May 30, 1990. R.91-105.

At oral argument, the state called Charlotte's guardian ad litem, Margaret Scarborio, as a witness. Tr.23. The following colloquy occurred:

Q [by Mr. Barlow] Do you have an opinion as to whether or not [the article quoting Judge Kanarek's termination order] was harmful to Charlotte's interest in having that published publicly?

A[Ms. Scarborio] *I believe* it's harmful to Charlotte. Uh, *if she were to read these statements* that the judge made, *I believe* her self-esteem *could* be extremely *damaged.* [emphasis added]

7 Rather than speak about the interests of the participants in *this case,* the circuit court instead spoke to generalized interests:

In this case the societal interests are enorously [sic] important to *all* citizens since the statutes involved are designed for the protection of juveniles from influences deemed harmful to their progress. [emphasis in original]

R.108.

1. A Generalized Interest in the Protection of Children Is Insufficiently Compelling to Overcome the First Amendment Privilege Here.

The harm suffered by Charlotte Puffinberger stems from the gruesome circumstances of her family life, not from the publication of one article published by *The Stuart News*. That harm arose from the pattern of child abuse in the Puffinberger home that began some time before November 1988. Following the death of her half-sister, Charlotte endured numerous other traumatic events, including her removal from her home and parents, the sentencing of her father to ten years in prison for aggravated child abuse, the jailing of her mother for neglect, the abdication of parental rights by her father, a custody battle between state officials and her mother, and the official termination by a court of her mother's parental rights. Tr.28-33. *Each* of these events received widespread publicity.

Despite these traumatic events, the State argued below that the publication of a single newspaper article threatens the child's emotional well-being. Tr.58. Yet the State did not produce any actual evidence of such harm. Rather, it relied solely on suppositions of what the future may hold for her. Tr.56-59. The State's argument that publication of the contents of the Order would lead to the "destruction of the esteem of Charlotte Puffinberger" (Tr.56) was also based on a legally insupportable theory — namely that, as the child's guardian *ad litem* testified: "Uh, if [Charlotte] were to read these statements that the Judge made, I believe her self-esteem could be extremely damaged." Tr.27. Thus, according to the State, although "there had been prior publicity in the case . . . the *most damaging thing* in this case was to the esteem of the child" which was the sole and direct result of publication of the Order — an Order, the State implied, which Charlotte would never know about absent publication by *The Stuart News*. *See* T.56. What the State overlooks in making this assertion, however, is the fact that the statute itself *permits a child to read the contents of a*

judge's order terminating parental rights. See § 39.411(3). Additionally, the State failed to introduce any evidence whatsoever that Roche's testimony would alleviate any of the alleged harm publication of the story supposedly caused. There simply is no compelling interest that disclosure could possibly serve.

In light of *Morgan,* this court cannot accept the State's view, nor the view of the circuit court, that a generalized interest in protecting children should defeat the important interests of Roche. When this case is looked at on its facts, and not on mere assumptions made by the State, the balancing of interest clearly falls in favor of Roche.

2. Because The State Failed to Produce Any Credible Evidence of a Compelling Need for Roche's Testimony, Roche and The Stuart News Can Only Speculate As to the Underlying Purpose of the Proceedings Below.

Given the lack of probative evidence that a compelling interest would be served by forcing Roche to identify his confidential source here, Roche and *The Stuart News* can only speculate as to the motives of the State in proceeding with its contempt motion. Indeed, the State's arguments below seem to be punctuated with ulterior motives not pertinent to the balancing test required by *Branzburg.*[8]

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8 At oral argument, for example, the State's attorney stated that, in accurately reporting and publishing the circumstances behind the receipt of Judge Kanarek's decision, Roche and *The Stuart News* somehow "flaunted their actions" (Tr.53). The State also made the unsupported and insupportable claim that Roche "doesn't care about the confidentiality of Charlotte [Puffinberger] *or any child in any future proceeding"* [emphasis added] (Tr.54); insinuated that Roche was a co-conspirator to a *criminal* act (Tr. 55); and made the ridiculous assertion that the harm perpetuated upon Charlotte was really the fault of Roche and other reporters "[t]he damage [to Charlotte] was done by Mr. Roche and the members of the press. The damage wasn't done by anyone else." R.57.

In argument below, the State also made the legally specious argument that his case factually resembles *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577 (Fla. 1990). R.55. In *Morejon,* however, the court upheld the contempt conviction of a reporter who was an *eyewitness* to a public police search and arrest of a criminal defendant. That simply is not the case here. Indeed, as the *Morejon* court itself noted:

> . . . Unlike the factual situations in *Branzburg, Morgan,* and *Huffstetler, there is no confidential source involved in this case which may "dry up" if revealed.* [emphasis added]

Morejon, 561 So.2d at 580. Here, of course, Roche did not observe any potentially criminal activity. Instead, he merely received and published information of obvious interest to the public. There is *no* evidence suggesting that Roche misappropriated Judge Kanarek's decision, the State's insinuation to the contrary.[9]

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9 Furthermore, a reporter cannot be held liable for another's illegal actions to which he has not participated. *See Pearson v. Dodd,* 410 F.2d 701 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969) (fact that newspaper columnists received copies of documents knowing they had been stolen from the office of a United States senator did not render the columnists liable for invasion of privacy based on intrusion).

3. Enforcement of the Subpoena Threatens the Public's Interest in Receiving Important News.

The court's decision below effectively punishes Roche for performing his function in society: the gathering and dissemination of news.[10]

In this situation, the news gathered and disseminated was of extreme public importance and interest.[11] Moreover, the disclosure of the news did *not* create the litany of harms hypothesized by the State. Indeed, there are no facts *in this case* that demonstrate why the State's generalized interest in enforcing its laws or in protecting the well-being of children are sufficiently compelling here to overcome the first amendment privilege held by Roche to refuse to identify a confidential source. There is a legitimate concern for the interests of children in family and judicial matters such as these, yet the *facts in this case* do not support the State's

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10 The United States Supreme Court specifically noted the importance of public scrutiny of judicial proceedings in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), where it explained that when court proceedings have

been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

448 U.S. at 571. Indeed, public scrutiny of the functioning of the judicial system, particularly in well-publicized and emotional case of child murder, "fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper v. Superior Court*, 457 U.S. 596, 606 (1982).

11 Publicity about another Florida case — in which an abused child had been returned to his home and was subsequently murdered by his stepfather — heightened public interest in Charlotte's eventual placement. Indeed, given the enormous public interest in the fate of Charlotte, and her mother's lack of interest in keeping that fate secret, common sense dictates that societal interests were served — rather than undermined — by the disclosure made to Roche and the subsequent publication.

assertion that harm has come to *this child,* or that society would be better served without receipt of the information published by *The Stuart News;* or that forcing Roche to disclose the source of that information would serve any identifiable purpose whatsoever.

The facts of this case do not warrant the contempt conviction imposed on Roche. The State has failed to demonstrate a compelling need for the information it seeks. As the Florida Supreme Court has held:

> The First Amendment is clearly implicated when government moves against a member of the press because of what she has caused to be published.

Morgan, 337 So.2d at 956. As a result, where

> contempt proceedings [are] not brought to punish violation of a criminal statute and [are] not part of an effort to obtain information needed in a criminal investigation . . . [but are for the] purpose [of forcing] a newspaper reporter to disclose the source of published information, so that the authorities could silence the source,

they will not be tolerated. *Id.*

IV. CONCLUSION

The trial court below erred in holding Tim Roche in contempt for his refusal to testify and Mr. Roche respectfully requests that his court reverse the decision of the court below and that his court further direct the court below and that this court further direct the court below to enter an order granting Roche's Motion to Quash.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 90-3071

**IN RE: INVESTIGATION:
FLORIDA STATUTE, ETC.,**

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN AND FOR
MARTIN COUNTY, FLORIDA
CRIMINAL DIVISION**

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was a witness subpoenaed to testify in an investigation being conducted by the State Attorney's office in the 19th Judicial Circuit in and for Martin County, Florida. Appellee was the State Attorney conducting the investigation. In this brief, the parties will be referred to as both Appellee or State and Appellant or Reporter, Tim Roche, the witness under subpoena.

In this brief the symbol "R" will be used to denote the record on appeal; all emphasis is supplied unless otherwise indicated.

SUMMARY OF THE ARGUMENT

While Florida and Federal Courts recognize a reporter's privilege not to disclose his sources in certain circumstances, there are limitations on that privilege. Where societal interests in requiring certain proceedings to remain confidential outweigh the media's first amendment rights to access to court proceedings, a reporter's privilege must give way. In determining which interest is greater, a court must consider three factors: whether the reporter has relevant information, here he stipulated he had; whether the State has exhausted all alternative sources of the information, here it was stipulated the State had; and whether the State has shown a compelling need for the information.

Below, the State established that Florida Statutes prohibit disclosure of juvenile court files and proceedings to the public, under penalty of the court's contempt power. As it is well established that society's interest in protecting participants in juvenile proceedings from public scrutiny outweighs the media's interest in receiving news, the qualified privilege to protect their sources enjoyed by reporters in some circumstances was not applicable here. As Mr. Roche acknowledged being the sole source of information as to who disclosed the confidential court order in violation of Chapter 39, the State clearly established its compelling need for his testimony, and Mr. Roche was properly held in contempt for his failure to provide information needed in the State's criminal investigation.

ARGUMENT

POINT I

THE FEDERAL AND FLORIDA COURTS RECOGNIZE JOURNALISTS HAVE A QUALIFIED PRIVILEGE TO REFUSE TO DISCLOSE THE IDENTITY OF CONFIDENTIAL SOURCES IN CERTAIN CIRCUMSTANCES (RESTATED).

Appellee agrees with Appellant's basic contention that both the State and Federal courts have recognized that a reporter has qualified privilege to protect his sources of information by refusing to disclose the identity of those sources; however, there are both state and federal limitations on that privilege and in this case, the trial court properly found the societal interests in denying the privilege outweighed the Constitutional interest in freedom of the press.

In *Morgan v. State,* 337 So.2d 951 (Fla. 1976), the Court adopted the balancing test enunciated by the U.S. Supreme Court in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), noting that "no such privilege can amount to an absolute right to an unimpeded flow of information in all places and at all times." *Morgan* at 954. The Court has further held that "every such claim of privilege 'should be judged on its fact by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.'" *Tribune Co. v. Huffstetter,* 489 So.2d 722, 723 (Fla. 1986). The *Branzburg* balancing test, adopted by the Florida Supreme Court in *Morgan, supra,* requires consideration of three factors: a) whether the reporter possesses information relevant to the proceeding; b) whether the State has a compelling need for the information the reporter has; *and* c) whether the party seeking the testimony has exhausted all alternative sources for the information; in

reviewing these factors, a court must strike a proper balance between constitutional and societal interests. *Miami Herald Pub Co. v. Morejon,* 561 So.2d 579 (Fla. 1990). Below, Appellant stipulated that the State has met factors, a) the reporter possesses relevant information, and c) the State has exhausted all alternative sources for the information. The Appellant asserts the State has failed to show that it has a compelling need for the information, thus Appellant reasons the State has failed to show that Mr. Roche's privilege of nondisclosure has been overcome.

The State disagrees with the Appellant's analysis in that Appellant begins by presuming that he possesses a privilege to be overcome; rather the State's position is that, under these circumstances, Appellant has *no* privilege to refuse to obey the State's subpoena and the trial court's order.

In *Morejon,* the Florida Supreme Court held that reporter has "nor privilege, qualified, limited, or otherwise" which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent court proceeding.; The court noted that the fact that the reporter was on a news gathering mission when he witnessed the event in question did not alter their decision. The State asserts these are precisely the circumstances of the instant case; the reporter, Mr. Roche, is the only eyewitness to the event in question, that is, the disclosure of a confidential court order. Thus, Mr. Roche has *no* privilege to refuse to obey the trial court's order of disclosure and the trial court's order must be affirmed.

POINT II

THE CIRCUIT COURT'S ORDER MUST BE AFFIRMED BECAUSE THE STATE HAS SHOWN A COMPELLING NEED FOR ROCHE'S TESTIMONY.

Appellant asserts that the State failed to show a compelling need for his testimony in this case because, a) given the prior widespread publicity regarding the parents of Charlotte Puffingerger, no harm could come to the child as a result of further publicity, and b) that no socially beneficial purpose would be served by requiring Appellant to disclose his source of the confidential court order. Contrary to Appellant's arguments, below the State did show that Charlotte Puffinberger could well be harmed by disclosure of matters contained in the trial court's confidential order terminating her mother's parental rights (R. 27-28, 32-33, 108) and the trial court cited several purposes beneficial to society which are served by compelling disclosure in this case (R. 107), thus the trial court's order compelling disclosure must be affirmed.

1. A Generalized Interest in the Protection of Children is Sufficiently to Compelling to Overcome the First Amendment Privilege Here.

Below, the child's GAL who was a practicing family therapist, testified that the child's best interests were served by protecting her from further notoriety, and by not disclosing to the child contents of the trial court's confidential order which indicated the child's mother did not care about her (R. 25-28). The GAL testified that such information can damage a child's self-esteem which can negatively affect the child's entire life; she felt that, notwithstanding the widespread publicity already given the case, publication of the order could be particularly damaging to the child because it was a judge's findings and not merely an article (R. 27-28,

32-33). Appellant's contention that since F.S. § 39.41(3) allows the child to view these closed files (actually F.S. § 39.471(3) is the statute applicable to termination proceedings), begs the question; first of all in this case the child is three years old, consequently it is doubtful she would have read this order herself, the danger is that some well-meaning (or less than well-meaning) adult will read the order and relate their impression to the child. More importantly, to the extent this child will one day reach an age and stage in life where she seeks out and reads the order of termination, her conscious choice to avail herself of this information is a far cry from having it published in a newspaper, without her knowledge and consent or any regard for its impact upon the child's emotional well-being. Thus, below, there was ample, unrebutted evidence that this child, whose interests the juvenile court expressly sought to protect, could be damaged by disclosure of the confidential order.

Further, Appellant's contention that a generalized interest in protecting children is insufficient to constitute a compelling reason to overcome a reporter's qualified privilege to refuse to disclose his confidential sources is *not* supported by Florida case law. The Florida Supreme Court *In Re: Adoption of H.Y.T.,* 458 So.2d 1127 (Fla.1984), upheld the Constitutionality of F.S. § 63.162(1) against a press challenge that this statute which closes adoption proceedings was overbroad and did not outweigh the media's first amendment right to access to court proceedings. The Court found that the Florida Legislature, in enacting F.S. § 63.1162(1), had recognized "an overriding public policy of protecting from harmful publicity, parties to and the subject of adoption proceedings", proceedings in which the court's primary duty is to serve the best interests of the child. *Id* at 1128. In *H.Y.T.,* the Court expressly rejected the media's argument that, as there had already been widespread publicity in the case, the child's right to privacy had already been destroyed, noting that to accept such an argument was to place on the child's

shoulders the burden of proving the need for protection which the people of the State, through the legislature, have already determined is necessary.

In *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988), the Second District upheld the contempt conviction of a reporter who published information contrary to F.S. § 39.408 and the trial court's order. There, the Second District held that F.S. § 39.408(2)(c) (which requires confidentiality and closure of all hearings involving . . . custody . . . and permanent placement of the child), was indistinguishable from F.S. § 63.162(1), thus the Florida Supreme Court's decision in *H.Y.T.* was controlling. The Second District held that, in light of *H.Y.T.,* the restrictions imposed by F.S. § 39.408 were constitutionally valid and required not only that the custody hearing be closed to the public but also that the proceedings be *confidential. Id* at 1175.

Below, there are several subsections of Florida Statutes which could have been, or were relied upon by the trial court: Section 39.411(3) [relating to actions in juvenile dependency matters] provides that the clerk *shall* keep all these court records separate from others and *shall not* open them to the public; violation of this subsection is punishable by contempt.

Section 39.467(5) [relating to actions terminating parental rights, now F.S. § 39.467(6)(1990)] provides that all hearing involving termination of parental rights *shall* remain confidential and closed to the public.

Section 39.471(3)[relating to termination of parental rights, now F.S. § 39.471(4)(1990)] provides that the clerk *shall* keep all these court records separate from others and *shall not* open them to the public; violation of this subsection is punishable by contempt.

Clearly each of these sections limits the media's access to information regarding these proceedings, clearly these sections of Florida Statutes, like F.S. § 39.408 and F.S. § 63.162 are legislative recognition of an overriding public policy of protecting children and parties to these proceedings from harmful publicity and are designed to assist courts in serving the best interests of children. Simply because there has been prior publicity about a case does not diminish a child's right to protection from statutes enacted for their protection. *H.Y.T.* Here, the information which Appellant asserts he was privileged to make public without revealing his source, is information which Florida's Legislature and Court's have repeatedly recognized as confidential and public policy of protecting children from harmful publicity overrides the media's interest in protecting its source who disclosed a confidential court order in violation of valid Florida Statutes. Indeed, as noted by the Florida Supreme Court in *H.Y.T.,* any impairment in the media's ability to report on these matters affects only matters of newsworthiness, not matters of real public or general concern, thus the impairment of the press's First Amendment privileges are minimal. There is ample authority that the State's interest in protecting children from harmful publicity takes precedence over the media's interest in assuring public access to information adduced in these proceedings, thus the trial court's findings must be affirmed. *H.Y.T.; Mayer.*

2. As the State Produced Ample Credible Evidence of a Compelling Need for Roche's Testimony, Roche Was Obligated to Comply with The Trial Court's Order That He Comply With The Subpoena And Disclose His Source of the Confidential Material (Restated)

Apparently Appellant is arguing herein that the State, having failed to show a compelling interest in obtaining the source of Mr. Roche's information, can show no purpose in pursuing contempt proceedings against Mr. Roche. As previously argued in Point II, 1., Supra, the State did show a compelling interest in obtaining the name of the source known only to Mr. Roche. Contrary to Appellant's assertions, he did not simply receive information and print it, Mr. Roche, by his own stipulation, is the only person with knowledge of who disseminated a confidential court order in *violation* of Florida Statutes.

Further, here, unlike the circumstances in *Morgan,* the purposes served by maintaining grand jury secrecy were not defeated by the matters published by the reporter. In *Morgan,* the Court found that grand jury secrecy was necessary to a) prevent flight of the accused; b) protect witnesses giving testimony before the grand jury, and c) ensure grand jurors can deliberate and vote without fear of retribution; as the matters published by the reporter in *Morgan* defeated *none* of these purposes, there was no justification in requiring the reporter to disclose the source of his information.

In *Huffstetter,* the Florida Supreme Court found that the only public purpose served by the statute (violated by the reporter's source when disclosing the information) was a private interest in reputation, which interest was insufficient to overcome the reporter's privilege.

Here, however, the purposes served by maintaining the confidentiality of juvenile dependency and termination of

parental rights proceedings, i.e. protection of children from harmful publicity, *was* defeated by disclosure of the confidential court order. As it is well established this interest outweighs the media's interest in reporting a human interest story, *H.Y.T; Mayer;* thus, the trial court properly determined that Mr. Roche's privilege was inapplicable and ordered him to disclose his source of the order released in violation of Florida Statutes.

Finally, the State asserts this case is quite similar to *Morejon;* contrary to Mr. Roche's assertion that he did not observe potentially criminal conduct, i.e. disclosure of a confidential court order, released in violation of an express statutory proscription, conduct punishable as indirect *criminal* contempt. Clearly this is very close the situation in *Morejon.* Appellant distinguishes *Morejon* from this case, arguing that in *Morejon,* there was no confidential source which would "dry up" if the reporter was required to testify, while here, apparently there is. Unfortunately for Mr. Roche, as argued here and below, notwithstanding the fact that Mr. Roche obtained a copy of the confidential order from a unidentified source, the media's interest in reporting news does not outweigh the public policy of protecting children from harmful publicity. Here, Mr. Roche received his information from a source he is not privileged to protect, not only because the source violated Florida Statutes in disclosing the information to Mr. Roche, but also because Mr. Roche's purpose is not to protect a source of information regarding an area of legitimate public concern, but rather he seeks to protect a source of information which is simply not a matter of public interest. *H.Y.T.*; *Mayer.* Thus, Mr. Roche, having failed to show how his interest in protecting his source outweighs the State's interest in protecting children, was properly held in contempt for failing to cooperate in the State's investigation by revealing the name of the person who violated Florida Statutes by disclosing confidential court documents to him.

3. Enforcement of the Subpoena Does Not Threaten The Public's Interest in Receiving Important News.

Appellant asserts that he is being punished for doing his job, that the material published by him did not produce harm, and that the public has a legitimate interest in these proceedings.

Appellant's argument overlooks the fact that both state and federal courts have recognized that there are limitations on a reporter's performance of his job, finding that there is not "an absolute right to an unimpeded flow of information in all places and all times." *Morgan* at 954. Mr. Roche is *not* being punished for doing his job, he is *not* being prosecuted for publication of this material; Mr. Roche is being punished for impeding the State's investigation into a violation of Florida Statutes and his willful refusal to obey a court order.

Appellant suggests that since the State did not show any harm to the child as a result of the information disseminated by him, he should not be punished for failing to obey the court's order. Again, his "no harm, no foul" argument begs the question; the issue is not whether anyone was hurt by publication of the material, the issue is whether he is privileged to protect someone who has disclosed information in violation of Florida Statutes. In *Morgan,* the purpose of the statute requiring grand jury secrecy were not defeated by the reporter's publication, thus he was not required to reveal his source, while here, the purposes of the statutes requiring confidentiality of juvenile court files, i.e. protecting personal matters of child custody, abuse, termination of parental rights from public disclosure, were defeated by publication, thus Mr. Roche is not privileged to refuse to disclose his source. Further, to suggest that some harm must be shown as a prerequisite to requiring disclosure of a reporter's source is ludicrous, such a test would result in there being

no protection to individuals from publication of improper matters, and no remedy from the harm as once the material has been published it cannot be unpublished. Such a suggestion is contrary to clearly established principles of law which recognize that the press does not have an unbridled right to access to information and would destroy the test annunciated in *Branzburg* used to *balance* constitutional interests versus societal interests. *Morejon; Morgan; Huffstettler.*

Finally, Appellant again argues that the State failed to show a compelling need for the information and that the news gathered was not a legitimate topic for publication. As previously argued by the State, it is well established that statutes, such as these, which make confidential matters concerning custody of children, abuse of children, termination of parental rights, are constitutional and the State's interest in protecting participants particularly children, in these proceedings from publicity, is paramount to the media's first amendment right to access to court proceedings. *H.Y.T.; Mayer; Florida Star v. B.J.E.*, 499 So.2d 883 (1st DCA 1986), rev'd on other grounds, ____ U.S. ____, 109 S.Ct. 2603 (1989), *Cape Pub. v. Hitchner,* 549 So.2d 1374 (Fla. 1989). Courts have made it clear these topics are *not* matters of genuine public concern, but of mere newsworthiness. *H.Y.T.; Mayer; Firestone v. Time,* 271 So.2d 745 (Fla. 1972).

It is equally well-established that a reporter's privilege does not extend to refusing to testify as to information needed in a criminal investigation, *Morgan; Morejon.* As the sections of Chapter 39 requiring that juvenile court files remain closed to the public and confidential, also provide that violation of these statutes is punishable by contempt, as Mr. Roche has stipulated that he is the sole source of knowledge as to who violated these statutes, and as he openly refuses to disclose the name of the person who disseminated the confidential court order, he cannot be heard

to complain that he has been held in contempt unfairly, his failure to reveal information needed in a criminal investigation cannot be tolerated.

CONCLUSION

WHEREFORE, based on the foregoing argument and authority cited herein, Appellee respectfully requests this Court **AFFIRM** the judgment and sentence below.

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

IN RE: INVESTIGATION
FLORIDA STATUTE, 27.04
SUBPOENA OF TIM ROCHE

Appellant,

vs.

Appellee.

CASE NO. 90-3071

L.T. CASE NO.
90-1290-CFA
Martin County

AN APPEAL FROM THE CIRCUIT COURT FOR MARTIN COUNTY

APPELLANT'S REPLY BRIEF

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II. ARGUMENT

As Appellee has recognized, a governmental body seeking to overcome the qualified journalists' privilege adopted by the Florida courts must provide evidence that the journalist possesses relevant information; that the government has exhausted all alternative sources for the information sought; *and* that forcing the reporter to reveal the information will serve a specifically identifiable and compelling state interest. *State v. Abreu,* 36 Fla.Supp. 2d 67, 16 Media L.Rep. (BNA) 2493 (Fla. 11th Cir. Ct. 1989). Here, while it has been stipulated that Roche possesses relevant information and that alternative sources for that information have been exhausted, Appellee has failed to articulate a specific compelling interest which would be served by forcing Roche to reveal the name of his confidential source. Instead, Appellee's arguments in favor of enforcement of the subpoena rest on misconstructions of settlement Florida law and a confusion of two separate and distinct First Amendment principles.

A. Appellee's Argument that Roche Enjoys No Privilege Is Not Supported By Florida Law.

Appellee's suggestion that Roche holds no privilege against disclosure here because he was a so-called "eyewitness" to the disclosure of information made confidential by state statute reflects a baffling misinterpretation of decisions by the Florida Supreme Court, including its recent holding in *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 679 (Fla. 1990). There, a Miami Herald reporter witnessed the arrest of a purported drug smuggler at a public airport and published a news story describing what he had seen. Upon being subpoenaed by the drug smuggler, the reporter refused, citing the qualified journalists'privilege. In affirming the district court's refusal to quash the

subpoena directed to the reporter, the Florida Supreme Court *explicitly distinguished* its earlier rulings in *Morgan v. State,* 337 So.2d 951 (Fl. 1976) (in which a reporter had been subpoenaed to name the confidential source who had given her information regarding a sealed grand jury presentment *in violation of state law);* and *Huffstetler,* 489 So.2d 722 (in which a reporter had been subpoenaed to name the confidential source who had given him information regarding the filing of an ethics complaint *in violation of state law). See Morejon,* 561 So.2d at 580 [emphasis added] ("Unlike the factual situations in . . . *Morgan*[] and *Huffstetler, there is no confidential source involved in this case* which may 'dry up' is revealed. *The only source for [the journalist's] article was his own personal observations.*"); *see also Abreu,* 38 Fla.Supp.2d at 69, 16 Media L.Rep. (BNA) at 2494 (*Morejon* ". . . involved a journalist who witnessed the commission of a crime at the time of arrest, and *its holding should be restricted to its facts.*") [emphasis added].

Roche, of course, was *not* an eyewitness to a crime in the *Morejon* sense — the news article he wrote on the basis of the information supplied to him by the confidential source could not have been written from Roche's "own personal observations." Rather, like the reporters in *Morgan* and *Huffstetler,* Roche received from a confidential source information made secret by state statute, and, like the reporters in *Morgan* and *Huffstetler,* holds a privilege to keep the identity of that source confidential unless and until the state has proved that a specific and compelling interest will be served by the forced disclosure of the source's identity.

B. In Attempting To Create A Compelling Interest Where None Exists, Appellee Has Confused Two Separate First Amendment Principles.

In an attempt to portray the information to be gleaned from the forced disclosure of Roche's confidential source as sufficiently important to overcome the journalist's privilege Roche holds, Appellee has melded together, without legal support, two distinct areas of First Amendment jurisprudence.[12]

First, Appellee asserts that "it is well established that society's interest in protecting participants [in cases involving juveniles] from public scrutiny outweighs the media's interest in receiving news." Appellee's Answer Brief at 15. This is simply a misstatement of constitutional law. *See Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607-08 [emphasis partially supplied; partially added] (holding Massachusetts State law forbidding the press from attending rape trials during the testimony of minor victims unconstitutional because while "safeguarding the physical and psychological well-being of a minor" is a "compelling" interest, "it

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12 Appellee's misunderstanding of the distinctive components of First Amendment law is further evidenced by its assertion that:

> To suggest that some harm must be shown as a prerequisite to requiring disclosure of a reporter's source is ludicrous, such a test would result in there being no protection to individuals from publications of improper matters, and no remedy from the harm as once the material has been published it cannot be unpublished.

Appellee's Answer Brief at 27. When "improper matters" are published, individuals may bring suit for libel or invasion of privacy. They may *not,* consistent with the First Amendment, half the publication before it occurs. Moreover, Appellant's arguments regarding the lack of harm caused by the publication of Judge Kanarek's Order were made to show that here, as in *Morgan* and *Huffstetler,* the purposes of the statute rendering the order confidential already had been extinguished by prior events in this particular case. *See* Appellant's Initial Brief at pages 11-14.

does not justify a *mandatory* closure rule, for it is clear that the circumstances of the *particular case* may affect the significance of the interest.") More importantly, in making this flawed assertion, Appellee has confused two distinct areas of the law: access to courtrooms and the qualified privilege to withhold the identity of a confidential source. This confusion permeates much of Appellee's Answer Brief.

For example, in support of its argument that Roche's testimony regarding the identity of his source should be compelled, Appellee cites *In re Adoption of HYT,* 458 So.2d 1127 (Fl. 1984) and *Mayer v. State,* 523 So.2d 1171 (Fla. 2d 1988) — neither of which bears any legal or factual relationship to the issues now before this court.

In *HYT,* the constitutionality of a Florida statute mandating closure of all adoption proceedings was challenged by some members of the Florida news media on grounds that it impinged on the public's First Amendment right of *access* to court proceedings. No confidential source was involved in that case; and no Branzburg analysis was performed by the court.[13]

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13 *HYT* is further distinguishable in that the adoption proceedings underlying the media challenge followed a protracted custody dispute between an orphaned child's two sets of grandparents, of interest to the public because of " 'mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others . . .' " *HYT,* 458 So.2d at 1129, quoting *Firestone v. Time,* 271 So.2d 745, 748 (Fla. 1972). By contrast, the case underlying the subpoena here involved the parental rights of a mother who already had served a jail sentence for her participation in the beating death of another of her children — an issue that generated *genuine* public concern. *See* Appellant's Initial Brief at pages 1-3. To assert, as Appellee nevertheless does, that *HYT* stands for the proposition that "*any* impairment in the media's ability to report [on matters regarding legal proceedings concerning children] affects only matters of newsworthiness, not matters of real public or general concern" is to misstate the holding of that decision. Moreover, to then twist this misstatement into grounds for stripping Roche of his qualified privilege to withhold the identity of his confidential source is simply to ignore not only the facts of this case, but the explicit holdings of the Florida Supreme Court in *Morgan* and *Huffstetler.*

Similarly inapposite is *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988), in which a reporter was adjudged guilty of indirect criminal contempt for her decision to publish information she obtained while sitting in on a custody hearing which the trial judge later deemed confidential and closed to the public.[14] The reporter challenged the validity of the contempt order on grounds that the judge's decision to prohibit her from publishing what she had learned constituted an unlawful prior restraint. *Mayer,* 523 So.2d at 1173-74. As in *HYT,* no confidential source was involved and no *Branzburg* analysis performed.

Neither *HYT* nor *Mayer* have anything to do with the sole question facing this court: whether the State has shown that a compelling interest would be served by forcing Roche to disclose the identity of his source. Indeed, while these cases *may* stand for the proposition that "the State's interest in protecting children from harmful publicity takes precedence over the media's interest in assuring public *access to information* adduced in these proceedings," Appellee's Answer Brief at 23, that proposition is not before the court at this time.[15]

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14 The reporter in *Mayer* was permitted to attend the hearing on the condition that she would not publish what occurred there if the judge determined that her presence was prohibited. After the judge made that determination and notified the reporter of it, the reporter went ahead and published the information in contravention of her promise not to.

15 If Appellee's central argument is that the release of any information regarding the disposition of the Puffinberger parental rights termination case would be harmful, Appellant cannot understand why a copy of Judge Karanek's Order was provided *by the State* to a *press relations officer* of the Department of Health and Rehabilitative Services ("HRS"), Appellee's Answer Brief at 8, *citing* the Record on Appeal at page 19. Given this scenario, it appears likely that the state recognized early on that the Puffinberger case, *unlike the vast majority of such cases,* has aroused enormous public concern, and that this concern warranted the public dissemination of at least some information regarding the outcome of the termination hearing. Roche's article, which did no more than disclose that disposition, accomplished neither more nor less than a press release from HRS would have.

C. Appellee Has Failed To Identify Any Specific Compelling Interest Which Would Be Served By the Forced Disclosure Of Roche's Source.

In arguing that a generalized interest in maintaining the confidentiality of parental rights termination proceedings is a sufficiently compelling interest to overcome Roche's privilege to withhold the identify of his source, Appellee disregards clear Florida precedent to the contrary. *See, e.g., Morgan,* 337 So.2d at 955 [emphasis added] ("The preservation of the rule of secrecy in which some governmental activity has traditionally been enshrouded, is *not* the specific and substantial governmental interest necessary to defeat a reportorial source privilege.") Indeed, the types of interests which must be asserted before the privilege can be overcome are illustrated by the United States Supreme Court's decision in *Branzburg,* where the information sought from the reporters was crucial to "extirpating . . . traffic in illegal drugs, . . . forestalling assassination attempts on the President, and . . . preventing the community from being disrupted by violent disorders endangering both persons and property . . ." *Branzburg,* 408 U.S. at 701. No such interest has been asserted here.

Rather, Appellee's arguments in favor of forced disclosure are rooted in the insupportable premise that "a generalized interest in the protection of children is sufficiently compelling to overcome the First Amendment privilege here." Appellee's Answer Brief at 19. That premise is fundamentally flawed on a number of levels.

First, Appellee's argument mischaracterizes the central point of Appellant's case. Appellant does *not* challenge either the constitutionality or the validity of the Florida statute mandating that parental rights termination cases be conducted behind closed doors. Nor does Appellant anywhere suggest that protecting children from harmful publicity is not, *in general,* a socially beneficial interest. Instead, in accordance with Florida law, Appellant argues that such an interest —

under the *extraordinary circumstances* of *this* case — is not sufficiently compelling to warrant the abridgement of an important privilege based on the First Amendment. *See, e.g., Morgan,* 337 So.2d at 950: "We cannot accept the view that a generalized interest in secrecy of governmental operations should take precedence over the interest in assuring public access to information that comes to the press from confidential informants."

Second, Appellee has utterly failed to show a logical nexus between "protecting children from harmful publicity" and forcing Roche to identify his source. Given the enormous publicity surrounding the brutal death of her sister and the fact that *both* her parents were incarcerated for this heinous crime, it seems difficult to believe that the publication of portions of a judge's order terminating her mother's parental rights would by itself cause damage to Charlotte Puffinberger's self-esteem, as Appellee disingenously predicts. Appellee's Answer Brief at 19-20. Additionally, Appellant does not understand how forcing him to reveal the identity of his source in *this* case will "protect children from harmful publicity," since Appellant is certainly *not* advocating a wholesale abrogation by the press of confidentiality statutes. Indeed, had it not been for the widespread public concern over the welfare of Charlotte Puffinberger (which resulted *not* from publicity, as Appellee suggests, but, of course, from the fact that *her parents beat her sister to death)* the particular article at issue here would have had no reason to be written. Attempting to undo the horrible wrongs visited upon Charlotte by jailing a news reporter who wrote about them is both misguided and inherently disingenuous.

As Appellee points out, "[a]pparently Appellant is arguing herein that the State, having failed to show a compelling interest in obtaining the source of Mr. Roche's information, can show no purpose in pursuing contempt proceedings against Mr. Roche."

Appellee's Answer Brief at 23. That is, in essence, exactly what Appellant is arguing, precisely because that argument reflects the settled law of this jurisdiction. Absent proof that a specific compelling interest would be served by forcing Roche to identify his source — proof that exists nowhere in this case — Appellee has no right to pursue contempt proceedings against Appellant. The vigor with which Appellee has continued this pursuit, particularly in light of the fact that there is *no* Florida precedent to support its position, leaves Appellant with no choice but to speculate as to the underlying purposes of this lengthy litigation.

IV. CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this court reverse the judgment below and enter an order quashing the subpoena served on him in this case.

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT
Post Office Box A
West Palm Beach, Florida 33402

IN RE: INVESTIGATION
FLORIDA STATUTE, etc.

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

4DCA CASE NO.
90-3071

L.T. CASE NO.
90-1290-CFA
MARTIN COUNTY

MOTION FOR CERTIFICATION

This motion is respectfully submitted on behalf of Appellant, Tim Roche ("Roche"), pursuant to the controlling provisions of Rules 9.030 (a)(2)(A) and 9.330(a) of the Florida Rules of Appellate Procedure, as well as Article V, Section 3(b)(4) of the Florida Constitution. As well be discussed with greater particularity below, the central issue presented in this court's November 13, 1991, Opinion should be submitted as a certified question to the Florida Supreme Court.

I. THE NOVEMBER 13, 1991, OPINION

On November, 13, 1991, this Honorable Court rendered its Opinion in the above-styled cause, a copy of which is attached hereto as Appendix "A." In essence, that opinion held "that the purpose served by maintaining the confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's disclosure of the court order involved herein and that such action on his part was not qualifiedly privileged." *See* Opinion at p.8. In reaching this conclusion, this court considered the largely undisputed factual background of this case. As the court noted, the parties to this action are in agreement that, pursuant to the Florida Statutes, juvenile dependency proceedings are entitled to protection from public scrutiny. *See* Fla. Stat. §§ 39.411, 39.467. The parties are also in agreement that Roche was entitled to a qualified privilege to maintain the confidentiality of his source(s) of information pursuant to a myriad of federal and state authorities. The parties are not, however, in agreement concerning the applicability and controlling nature of two Florida Supreme Court decisions which Roche contends require reversal of the court below. *See Morgan v. State,* 337 So.2d 951 (Fla. 1976) [a copy of which is attached hereto as Appendix "B"]; *Tribune Co. v. Huffstetler,* 489 So.2d 722 (Fla. 1986) [a copy of which is attached hereto as Appendix "C"].

II. THIS COURT'S NOVEMBER 13, 1991, OPINION DEALS WITH AN ISSUE OF GREAT PUBLIC IMPORTANCE WARRANTING SUBMISSION TO THE FLORIDA SUPREME COURT OF A CERTIFIED QUESTION

Roche respectfully submits that the following question should be certified to the Florida Supreme Court as a matter of great public importance pursuant to the provisions of Rule 1.330(a) of the Florida Rules of Appellate Procedure:

> Whether, under the particular circumstances of this case, the State's generalized interest in maintaining the confidentiality of juvenile proceedings is sufficiently compelling to outweigh the grant of a qualified privilege to journalists to refuse to disclose confidential sources afforded by the First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution.

Roche submits that the aforestated issue is a question of great public importance. As this court stated in the opening paragraph of its November 13, 1991, Opinion:

> This case involved a consideration of the tension between the constitutional right of the public to unencumbered access to information from anonymous sources in the generalized governmental interests in protecting the secrecy of juvenile proceedings from public scrutiny. More particularly, the case focuses upon a determination of the priority of societal interests in requiring certain proceedings to remain confidential as opposed to a reporter's privilege against coerced disclosure of confidential sources.

See Opinion at p.1. As noted in this court's Opinion, the issue presented involved a clash between two areas of constitutional

and statutory law that are truly of great societal importance As this court stated in the November 13, 1991, Opinion, the State's interest in protecting the rights of children "has always been of primary importance and given preferential treatment by the courts of this land." *See* Opinion at p.7. In this case, the State's interest in maintaining the confidentiality of juvenile proceedings collides with the protections afforded journalists by the First Amendment to the United States Constitution and the corresponding protections of Article I, Section 4, of the Florida Constitution.

Additionally, this case presents a legal issue unresolved by the Florida Supreme Court. In the only two cases decided by the supreme court where a confidential news source was implicated (*Morgan* and *Huffstetler*), the supreme court decided that the journalist's qualified privilege outweighed what many regard as the most compelling governmental interest of all — the administration of criminal justice. As of this date, there are no Florida Supreme Court decisions with a holding unfavorable to a journalist which involve a confidential news source.[16] Should the supreme court hear this matter and render its opinion, it would undeniably clarify the parameters of a reporter's qualified privilege.

The district court's have routinely utilized certification of questions of great public importance to bring before the Florida Supreme Court issues which, by virtue of its limited discretionary jurisdiction, might otherwise escape the

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16 In both *Miami Herald Publishing Co. v. Morejon*, 561 So.2d 577 (Fla. 1990), and *C.B.S.,Inc. v. Jackson*, ___So.2d ___, 16 FLW S272 (Fla. April 25, 1991), the supreme court concluded that the factual situations presented did not implicate any confidential sources of information. In those decisions, the supreme court held that there is no qualified privilege which protects journalists from testifying as to their eyewitness observations or from producing physical evidence surrounding the arrest of a criminal defendant. This court expressly disavowed any reliance on *Morejon* in its November 13, 1991, Opinion. *See* Opinion p.6.

Supreme Court's review. *See, for example, Department of Health & Rehabilitative Services v. Yamuni,* 529 So.2d 258 (Fla. 1988); *Rasmussen v. South Florida Blood Service, Inc.,* 500 So.2d 533 (Fla. 1987); *Insurance Company of North America v. Pasakarnis,* 451 So.447 (Fla. 1984). Appellant respectfully submits that the question presented in the present case clearly warrants utilization of the certification process.

III. CONCLUSION

Based upon the foregoing discussion, Roche respectfully requests that this court certify the central issue in this case to the Florida Supreme Court as a question of great public importance pursuant to the provisions of Rule 9.330, Florida Rules of Appellant Procedure.

Respectfully submitted this 2nd day of December, 1991.

/s/

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MANDATE

from

DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Hugh S. Glickstein, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.
DATE: JANUARY 14, 1992

CASE NO.: 90-3071

COUNTY OF ORIGIN: MARTIN

T.C. CASE NO.: 90-1290 CFA

STYLE: IN RE: INVESTIGATION: FLORIDA
STATUTE 27.04 v. STATE

Marilyn Beuttenmuller, Clerk
District Court of Appeal
Fourth District

ORIGINAL TO: HON. MARSHA STILLER, CLERK

CC: Robert L. Lord, Jr.
Anne R. Noble
Attorney General — W. Palm Beach

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,295

IN RE: INVESTIGATION:
FLORIDA STATUTE 27.04
SUBPOENA OF TIM ROCHE

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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Explanation of References

A true and correct copy of the decision of the Fourth District Court of Appeal may be found in the appendix to this petition. References to that decision will be made by the notation "Op. at ___."

* * *

ARGUMENT

A. A Decision Holding That a Generalized Interest in Preserving the Secrecy of an Entire Category of Governmental Proceedings is Inherently Superior to a Reporter's Privilege Against Forced Disclosure of a Confidential Source Directly Conflicts with the Settled Law of this State.

Sixteen years ago, in *Morgan v. State,* 337 So.2d 951 (Fla. 1976), this Court unequivocally announced that Florida journalists could not be forced to disclose the identities of their confidential sources absent evidence that disclosure would serve a specific and compelling interest. There, this Court reversed a contempt conviction imposed on a reporter who had refused to identify the confidential source of information she published regarding the outcome of a closed grand jury proceeding. In overturning the conviction, and quashing the subpoena on which it was based, this Court rejected the Second District Court of Appeal's ruling that " 'preservation of the rule of secrecy in grand jury proceedings and . . . preservation of the integrity of the grand jury as an arm of the judicial branch government' " were *by themselves* compelling interest "outweighing . . . First Amendment considerations." *Id.* at 955, *quoting Morgan v. State,* 325 So.2d 40, 43 (Fla. 2d DCA 1975). Indeed, this Court explicitly held that the fact that a particular category

of governmental proceedings traditionally had been "enshrouded" in secrecy was *not,* by itself, evidence of "a specific, substantial interest" sufficient to "defeat a reportorial source privilege." *Id.* "A nonspecific interest, even in keeping the inner workings or the Pentagon secret, has been held insufficient to override certain First Amendment values." *Id.* Thus, this Court continued, "[w]e cannot accept the view that a *generalized interest in secrecy of governmental operations* should take precedence over the interest in assuring public access to information that comes to the press from confidential informants." *Id.* [emphasis added]. Contrary to the holding of the district court below, this Court placed *no* limitations on this absolute rule.

That no exceptions were intended was made clear by this Court a decade later, when it reaffirmed the explicit language of *Morgan* in *Tribune Co. v. Huffstetler,* 489 So.2d 722 (Fla. 1986). There, in reversing a contempt conviction entered against a reporter for his refusal to name the confidential source who disclosed to him records sealed by state statute, this Court again held that a *generalized* interest in the secrecy of governmental proceedings is "insufficient to override certain First Amendment values." *Id.* at 723-724, *quoting Morgan,* 337 So.2d at 955.

In upholding the contempt conviction entered against Petitioner Roche below, the district court carved an unwarranted — and insupportable — exception to settled law. First, it misread *Morgan* and *Huffstetler* to stand for the proposition that "a generalized interest in the secrecy of government operations should not *ordinarily* take precedence over the interest involved in assuring the public access to information that comes to the press from confidential sources." Op. at 7 [emphasis added]. Neither *Morgan* nor *Huffstetler* includes any such limitation. Second, on the basis of this misreading, the district court held that "the *generalized* governmental interests in protecting the secrecy

of juvenile proceedings" *by themselves* are sufficient to overcome "a reporter's privilege against coerced disclosure of confidential sources." *See* Op. at 1. As a result of this fundamental conflict with the Court's prior decisions, discretionary review should be granted.

B. The Decision Below Expressly, and Wrongly, Construes Provisions of the Federal and Florida Constitutions.

Both this Court and the United States Supreme Court have "made it clear" that the First Amendment mandates that *each* claim to privilege made by a journalist must be reviewed individually and " 'judged on *its facts* by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.' " *Huffstetler,* 489 So.2d at 723, *quoting Branzburg v. Hayes,* 408 U.S. 665, 710 (1972) (Powell, J., concurring [emphasis added]. Thus, "generalized" interests — which, by definition, fail to account for individualized fact patterns — have uniformly been held by this Court to be insufficient to overcome a reporter's privilege to shield the identity of a confidential source. *See Morgan,* 337 So.2d at 955 (generalized interest in secrecy of grand jury proceedings); *Huffstetler,* 489 So.2d at 724 (generalized interest in enforcing state laws).

Yet the court below failed to do any balancing at all, determining instead that a *generalized interest* in protecting "the privacy rights of minors" by itself "took precedence over the media's first amendment rights . . ." Op. at 8. In reaching this conclusion, the district court misconstrued the Florida and federal constitutions, explicitly relied on inapposite precedent, and implicitly relied on insupportable theories regarding the critical role of the media in important child abuse cases.

First, the district court determined that no balancing was necessary because "the interest in protecting the rights of children . . . has *always* been of primary importance and given preferential treatment by the courts of this land." Op. at 7 [emphasis added]. Yet the United States Supreme Court has rejected that proposition. *See, e.g., Globe Newpaper Co. v. Superior Court,* 457 U.S. 596, 607-08 (1982) (holding Massachusetts law forbidding the press from attending rape trials during the testimony of minor victims unconstitutional because, while "safeguarding the physical and psychological well-being of a minor" is a "compelling" interest, "it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the *particular case* may affect the significance of [that] interest") [emphasis partially supplied and partially added].

Moreover, in support of this flawed assertion, the district court confused two distinct areas of First Amendment law: access to courtrooms and the qualified privilege to withhold the identity of a confidential source. Indeed, rather than examining the facts of *this case* and the interests at issue within the context of those specific facts, as the First Amendment and Florida constitution require, the court below relied squarely on *In re Adoption of HYT,* 458 So.2d 1127 (Fla. 1984) and *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988) — neither of which bears any legal or factual relationship to the single issue of this case.

In *HYT,* the constitutionality of a Florida statute mandating closure of all adoption proceedings was challenged by the news media on grounds that it impinged on the right of access to court proceedings. No confidential source was

involved in the case; and no *Branzburg* analysis was performed by the court.[17]

Similarly inapplicable is *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988), in which a reporter was adjudged guilty of indirect criminal contempt for her decision to publish information about a child custody case that the trial judge had deemed to be confidential. The reporter challenged the validity of the contempt order on grounds that it constituted an unlawful prior restraint. *Mayer,* 523 So.2d at 1173. As in *HYT,* no confidential source was involved and no *Branzburg* analysis performed.

Neither *HYT* nor *Mayer* have anything to do with the sole question facing this Court: whether the State has shown that a specific and compelling interest would be served by forcing Roche to disclose the identity of his source. That the district court completely failed to comprehend what *was* at issue is made clear by the penultimate paragraph of its Opinion, where it stated:

> We conclude . . . that the purposes served by maintaining the confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's *disclosure of the court order* involved herein and that *such action* on his part was not qualifiedly privileged.

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17 *HYT,* is further distinguishable in that the adoption proceedings underlying the media challenge followed a protracted custody dispute between an orphaned child's two sets of grandparents, of interest to the public because of " 'mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others. . . .' " *HYT,* 458 So.2d at 1129, quoting *Firestone v. Time,* 271 So.2d 745, 748 (Fla. 1972). By contrast, the case underlying the subpoena here involved the parental rights of a mother who already had served a jail sentence for her participation in the beating death of another of her children — an issue that generated *genuine* public concern.

Op. at 8 [emphasis added]. Roche never contended that his *disclosure of the Order* was qualifiedly privileged. What he asserted below, and asserts here, is that, under the First Amendment and the Florida constitution, he holds a qualified privilege to withhold the identity of the confidential source who disclosed the Order to him. This is an entirely separate question from the one answered by the District Court.[18]

Finally, the district court's decision reflects its misunderstanding of what actually would be accomplished compelled disclosure. As the *Morgan* Court noted, in factual circumstances nearly identical to those at issue here:

> These contempt proceedings were not brought to punish violation of a criminal statute and were not part of an effort to obtain information needed in a criminal investigation. *Their purpose was to force a newspaper reporter to disclose the source of published information, so that the authorities could silence the source.* The present case falls squarely within this language in the *Branzburg* plurality opinion: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."

337 So.2d at 956, *quoting Branzburg,* 408 U.S. at 707-08 [emphasis added]. There is no justification for the proceedings against Roche, and this Court should review and reverse the decision of the District Court.

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18 While *HYT* and *Mayer* may demonstrate, as the district court noted, that "the privacy rights of minors as protected by the statutes involved therein took precedence over the media's first amendment rights involved," Op. at 8, neither the statutes, nor the specific factual situations, nor the First Amendment rights involved in those cases are at issue here.

C. No Reason Exists in this Case for Departing from the Settled Law of this Jurisdiction Regarding the Journalists' Qualified Privilege.

The district court failed to articulate a legally cognizable reason for distinguishing between the interests served by keeping secret grand jury presentments *(Morgan)* or complaints filed with the ethics commission *(Huffstetler)* and those served by keeping secret the disposition of termination proceedings brought against convicted child abusers. There is none. The fact that a child was involved in the proceeding is not, in and of itself, sufficient reason for carving unworkable distinctions into long settled law. There is no credible evidence anywhere in the record of this case which suggests that the information disseminated by Roche caused any recognizable harm to either Charlotte May Puffinberger or to society in general. Moreover, American history is rife with examples of cases in which publicity about events concerning children has, as here, *benefited* both society in general and the individual child in particular.

In 1874, *The New York Times* published a series of article about Mary Ellen Wilson, a severely abused eight-year-old girl whose mother was indicted for neglecting and physically beating her. *See, e.g.,* "Mary Ellen Wilson, Further Testimony in the Case – Two Indictments Found Against Mrs. Connolly By The Grand Jury," *N.Y. Times,* Apr. 14, 1874, at p.1. That series — the first published account of child abuse in America — not only garnered enormous public sympathy for Mary Ellen (resulting in her adoption and a subsequently happy childhood) but also resulted in the formation of the Society for the Prevention of Cruelty to Children. *See* P. Stevens and M. Eide, "The First Chapter of Children's Rights," Am. Heritage, July/Aug. 1990, at p. 84.

More recently, publicity about the death of Bradley McGee (who had been returned to his abusive parents by court order

only to be murdered by his stepfather) refocused public attention on the rights of abused children, and let to public insistence on better protections for abused children. Public policy would seem to favor, rather than discourage, publicity about child abuse and child abusers.

CONCLUSION

For all these reasons, Petitioner respectfully requests that this Court review and reverse the decision of the court below.

Respectfully submitted,

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